

1 IN THE UNITED STATES DISTRICT COURT
2 DISTRICT OF UTAH
3 CENTRAL DIVISION
4
5 THE SCO GROUP,)
6 Plaintiff,)
7 vs.) CASE NO. 2:03-CV-294DAK
8 INTERNATIONAL BUSINESS)
9 MACHINES CORPORATION,)
10 Defendant.)
11 _____)
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13 BEFORE THE HONORABLE DALE A. KIMBALL
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15 March 1, 2007
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19 Motion Hearing
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24 Ed Young
Court Reporter
25 247 U.S. Courthouse
350 South Main Street
Salt Lake City, Utah

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1 March 1, 2007

2:30 p.m.

PROCEEDINGS

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4 THE COURT: We're here this afternoon in the matter
5 of SCO v. IBM, 2:03-CV-294.

6 For plaintiff Mr. Brent Hatch and Mr. Edward Normand
7 and Mr. Stuart Singer.

8 MR. SINGER: Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 For defendant, Mr. David Marriott and --

11 MR. MARRIOTT: Good afternoon.

12 THE COURT: -- Ms. Amy Sorenson, Mr. Michael Burke
13 and Mr. Todd Shaughnessy.

14 MR. SHAUGHNESSY: Good afternoon, Your Honor.

15 THE COURT: I understand that you want more time on
16 Wednesday. We can start at 2:00 on Wednesday, so you have the
17 extra 20 minutes that somebody is asking for.

18 MR. SINGER: We appreciate that, Your Honor.

19 MR. MARRIOTT: Thank you, Your Honor.

20 THE COURT: 2:00 on Wednesday.

21 I have a jury out, and if a verdict comes in, then
22 you can all go somewhere else while we get the jury back in to
23 take the verdict. That has to take precedence. Sorry about
24 that.

25 First we have IBM's motion on summary judgment on

1 SCO's contract claims, and SCO's motion for partial summary
2 judgment or SCO's third cause of action for breach of contract.
3 45 minutes per side.

4 Who is going first?

5 MR. MARRIOTT: I believe that is me, Your Honor.

6 THE COURT: Go ahead.

7 No one is required to take all of the time asked for,
8 but --

9 MR. MARRIOTT: Thank you.

10 THE COURT: You, of course, can.

11 MR. MARRIOTT: We have prepared a book of exhibits,
12 if I may approach for the Court's convenience?

13 THE COURT: Sure.

14 MR. MARRIOTT: We have a copy for counsel.

15 THE COURT: Thank you.

16 MR. MARRIOTT: Referring Your Honor to tab one, if I
17 may, of the book, there are four contracts that underlie SCO's
18 claims for breach of contract: The IBM software agreement, the
19 IBM sublicensing agreement, the Sequent software agreement, and
20 the Sequent sublicensing agreement. And SCO has a separate
21 claim or count with respect to each of those four contracts.

22 IBM is, we respectfully submit, entitled to summary judgement
23 with respect to each of those counts for at least four reasons
24 which are set out at tab two of our book.

25 THE COURT: And they are also in your briefs.

1 MR. MARRIOTT: And they are also in our briefs.

2 What we would like to do, with the Court's
3 permission, is focus in the few minutes that we have on the
4 first three of those reasons. And then I would like to focus,
5 Your Honor, on the particular technologies which are at issue
6 on this motion, those things which SCO contends were
7 contributed improperly by IBM to Linux. Those appear, Your
8 Honor, at tab four of the book.

9 Let me make clear, if I may, from the outset,
10 something about those four items of technology. First is the
11 JFS contribution, which is a contribution SCO contends was made
12 by IBM to Linux in violation of the IBM agreements. That is
13 the first category.

14 The next three categories are the RCU contribution,
15 the LTP contribution, and certain negative know-how and
16 experience. The allegation by SCO is that those contributions
17 were contributed by IBM to Linux in violation of the Sequent
18 agreements. Now, we'll come back to those technologies in
19 detail, but let me make a few things absolutely clear about
20 those technologies from the outset. None of that material,
21 Your Honor, is UNIX System V source code, methods or concepts.
22 None of that material is a modification or a derivative work of
23 Unix System V. None of it was contributed to Linux by
24 reference to UNIX System V, which this is original IBM work
25 created independent of UNIX System V. That brings me, Judge,

1 to the first of the four points I would like to underscore.

2 First, Your Honor, is that SCO can't establish a
3 breach of contract and that is true for three reasons. The
4 first reason is the plain language of these agreements
5 forecloses SCO's theory. Second is that the parol evidence,
6 the overwhelming parol evidence forecloses the theory. The
7 third is that SCO's theory is patently unreasonable, as I
8 intend to demonstrate and, therefore, untenable under the
9 controlling cases.

10 As I said, there are four contracts at issue. Two of
11 those are the sublicensing agreements. SCO has not offered in
12 its papers a shred of evidence to demonstrate that IBM breached
13 the sublicensing agreement. It has not identified which
14 provision it breached. It has not identified any evidence of
15 breach and it has not explained a breach. For that reason
16 alone, the two counts related to those contracts, counts two
17 and four, are disposed of without further analysis.

18 That leaves the remaining two claims concerning the
19 software agreements. Your Honor, let me take the three points
20 as to why summary judgment is appropriate as to each of those.
21 First, the plain language. There is no dispute here that the
22 contracts at issue concern software product, AT&T's UNIX System
23 V material. There is also no dispute that IBM has not
24 contributed to Linux any UNIX System V material. The entire
25 case as it concerns SCO's contracts turns on the so-called

1 Section 2.01 of the agreement, the resulting material
2 provision.

3 That section, however, Your Honor, speaks about the
4 licensee having the right to prepare modifications and
5 derivative works, provided the resulting materials are treated
6 under the contract as confidential. You'll see that language
7 at tab nine of the book. It is undisputed, as I said at the
8 outset, that none of the four categories of material at issue
9 is resulting material. None of it is a modification and
10 derivative work of System V. For that reason alone the claim
11 fails.

12 Now, faced, Your Honor, with that fact, SCO contends
13 that Section 2.01 not only gives it rights with respect to UNIX
14 System V, and modifications and derivative works, but anything
15 that ever touches or is in any way associated with the
16 modification and derivative works of UNIX System V. That we
17 respectfully submit stretches the meaning and the language of
18 Section 2.01 to an absurd degree.

19 If I may illustrate, Your Honor. If you imagine and
20 if you look at the demonstrative to Your Honor's left and to my
21 right, that is a depiction of the Linux operating system.
22 You'll see a series of circles with particular chunks or pieces
23 in it. Imagine you have a product, Your Honor, with 1,000
24 different pieces to it. Those pieces represent various
25 components of the system. So imagine you have this and this is

1 Your Honor's product and you have 990 of these pieces, if there
2 are 1,000, and they are Your Honor's. They are your own
3 original work.

4 Well, imagine that you want to license from others
5 additional material and to add them to your product, and you
6 take the additional ten that make up the 1,000 and you license
7 them to party A and party B and party C. Let's just assume
8 that one of the items that Your Honor licenses from a third
9 party is licensed from SCO. It is AT&T's UNIX System V
10 software. Let's assume that the contracts mean what SCO says
11 they mean. Your Honor, under SCO's theory of the case, not
12 only is Your Honor -- this is your product which you have
13 licensed other people's materials in part, ten of the 990,
14 under SCO's theory, Your Honor, not only are you required to
15 keep confidential the one part of the 1,000 that you licensed
16 from SCO, you're required to keep confidential the entirety of
17 the product, so as to keep confidential the one.

18 That does not make SCO's case, Your Honor, because
19 IBM has neither disclosed the one, nor has it disclosed in
20 entirety of the product. So SCO's theory goes to another
21 level. It says you are required, owner of this product, the
22 1,000 items, to keep confidential anything and everything that
23 is in it, even if you take it out, and even if you license it
24 from a third party who says to you you can do with it what you
25 want, and even if you take out the one item, Judge, and put it

1 on the shelf, that material and those 1,000 items, 990 of which
2 are your original work under SCO's theory are controlled by
3 them. You might own them, they say, but they control them.

4 If you take it out, take out your one and you put it
5 in another product, under their theory they also control the
6 other product, and whatever the other components are in that
7 product. That, Your Honor, we would respectfully submit is not
8 a reasonable construction of Section 2.01 of the agreement.

9 The second point I want to make concerns the parol
10 evidence. The overwhelming parol evidence here, Your Honor,
11 compels the conclusion that SCO's theory is not a reasonable
12 construction of the agreement. By the plain language, Your
13 Honor, parol evidence ought not to be considered. In the event
14 that Your Honor considers it, we would submit, and it is
15 overwhelmingly in favor of IBM's construction, there are ten
16 individuals, and we called them involved persons in our papers,
17 who were involved in the execution and the negotiations of
18 these agreements, five of them from AT&T, three of them from
19 IBM, two of them from Sequent. They appear on the scene before
20 Your Honor. Those individuals have offered specific, and we
21 believe undisputed testimony, that refutes SCO's theory of the
22 case. If we may share with Your Honor some clips from their
23 depositions.

24 Mr. Wilson.

25 (WHEREUPON, the following deposition clips were

1 played.)

2 MR. WILSON: The only part of the derivative work
3 that would have to be protected under the software agreement
4 would be that portion of the software product that would be
5 contained in a derivative work.

6 To the extent that modifications of derivative work
7 contained portions of the software product, they were to
8 protect the software product portion under the terms of the
9 license agreement, that portion which was theirs, whatever,
10 they can do whatever.

11 The intent was to make sure that we protected the
12 software product. To the extent that they used that software
13 product and created works which were original works, that was
14 up to them to do what they pleased with those things.

15 When you say those things, you mean that portion of a
16 derivative work that they had developed and that in your view
17 they owned; is that correct?

18 That's correct.

19 MR. MARRIOTT: That was the head of AT&T's licensing
20 business.

21 (WHEREUPON, the following deposition clips were
22 played.)

23 Mr. Wilson.

24 If they created a derivative work and the derivative
25 work contained zero content of the software product, then they

1 could do as they wish. If that contained portions of the
2 software product, then they had to abide by the terms and
3 conditions of the agreement with regard to that portion that
4 contained the derivative work, contained the software product.
5 Our agreements only went to the software product itself, not to
6 their original created works.

7 MR. MARRIOTT: This is the man for AT&T that
8 signed --

9 (WHEREUPON, the following deposition clips were
10 played.)

11 David Frasure.

12 With respect to the agreements that IBM entered into
13 with AT&T, is it your understanding that AT&T through those
14 agreements had any right to control IBM's use of source code
15 that it developed on its own?

16 They had no right to control that software that was
17 developed by IBM.

18 With respect to the agreements that Sequent entered
19 into with AT&T, is it your understanding that AT&T through
20 those agreements, gained any right to control Sequent's use of
21 the source code that it developed on its own?

22 They did not gain any rights to control the software
23 developed by Sequent.

24 Was it the case that from AT&T Technologies'
25 perspective that the licensee could do whatever it wanted with

1 the source code it developed?

2 Yes.

3 Michael DeFazio.

4 The basic idea is that the AT&T USL, Novell code was
5 owned and protected by Novell. The code developed by our
6 licensees was owned and controlled by them. When the two went
7 together to market our rules prevailed. When the two were
8 separate our rules prevailed on ours, and their rules prevailed
9 on theirs.

10 Would you agree, Mr. DeFazio, that the agreements did
11 not and do not give AT&T, USL and Novell or any of their
12 successors or assigns the right to assert ownership or control
13 over modifications and derivative works prepared by its
14 licensees, except to the extent of the original UNIX System V
15 source code included in such modifications and derivative
16 works?

17 That's correct.

18 Stephen Vukasonvich.

19 And any code that IBM modified, in your view, under
20 this provision, IBM thereafter owned?

21 They owned any modification. They owned their code
22 that they developed, and we owned our code.

23 Ira Kistenberg.

24 By the terms of Section 2.01, did AT&T intend to
25 restrict Sequent's rights to disclose code that Sequent

1 developed on its own?

2 If Sequent developed it on its own, AT&T had no
3 rights to it.

4 My question is simply whether it was AT&T's
5 understanding that Sequent would own the modifications and the
6 derivative works that they prepared based on UNIX System V.

7 They owned it to do what they want with it, yes.

8 Were licensees of AT&T free to use and to disclose
9 the modifications or derivative works they created provided
10 they did not use or disclose any portion of licensed UNIX
11 System V source code?

12 Yes.

13 Thomas Cronan.

14 In my discussions with AT&T what they were trying to
15 protect were several derivative works. They were trying to
16 protect their own System V code. They felt like they had to
17 protect anything that was shipped around with their code in it.
18 If we separated out our code from their code they didn't need
19 to protect it. That was our discussion.

20 Richard McDonough.

21 Another huge issue for us was ownership of whatever
22 we developed, and we wanted to make it clear that whatever we
23 developed we owned. We weren't making any claim to the code
24 that AT&T owned and developed itself, but we wanted to make
25 certain that anything we or our subcontractors or anybody

1 working for us developed, we owned and had the right to use and
2 license.

3 I would just say that there is no way on God's green
4 earth that I would have entered into an agreement where
5 somebody else owned what IBM was investing tens of millions of
6 dollars in developing. An agreement never would have happened.

7 So we had to make it clear that whatever IBM developed IBM
8 owned.

9 Jeffrey Mobley.

10 My understanding was that we were free to do whatever
11 we wanted to do with the products we were developing.

12 David Rodgers.

13 My understanding of the license is that the UNIX
14 System V code had to be maintained as the AT&T private property
15 and withheld from disclosure, but if there were other elements
16 of the software product created by Sequent, that those were
17 Sequent's to dispose of as it chose.

18 Roger Swanson.

19 Those parts of the source code that we wrote were not
20 required to be kept confidential under the terms of the
21 agreement, but we could do with them as we saw fit.

22 The aspects of the derivative works that we
23 developed, we could choose to disclose or not disclose. We had
24 the ownership, we had the control. That was my understanding.

25 Once, again, that's precisely what our understanding

1 was, that once we had made modifications, we still had an
2 obligation to protect that part of the UNIX System V material,
3 according to the restrictions of the agreement, but that work
4 that we had developed ourselves, the source code that we
5 developed, was not included as a part of those confidentiality
6 restrictions.

7 (WHEREUPON, the deposition clips were concluded.)

8 MR. MARRIOTT: These witnesses, Your Honor, have
9 offered substantial additional testimony, and it is in the
10 papers, and we have provided CD's in the book, and we have
11 provided Your Honor with three hours of the same, should you
12 feel like you need to see that.

13 THE COURT: I appreciate that.

14 MR. MARRIOTT: I thought you might.

15 In an attempt to avoid summary judgment, Your Honor,
16 SCO has pointed to the declarations of a number of witnesses.
17 They appear at tab 13 of the book. These people have the use
18 of the contracts, which they never communicated to IBM as they
19 were not a part of the negotiations, and a number of them were
20 not employed by AT&T at the time the agreement were executed.
21 Their testimony, we submit, is no impediment to the entry of
22 summary judgment. As overwhelming parol evidence, the
23 testimony of those who negotiated and executed these
24 agreements, who communicated their views to IBM, is we submit
25 overwhelming in favor of IBM and against SCO's theory.

1 You looked like you had a question.

2 THE COURT: I don't.

3 MR. MARRIOTT: The third reason, Your Honor, why the
4 contract claims fail is that SCO's theory is, as we show in the
5 book at tabs 19 through 23, we think unreasonable as a matter
6 of law. It is inconsistent with IBM's ownership rights, it is
7 contrary to copyright law, it is against public policy, and it
8 leaves in circumstances I'll explore later, an absurd result.

9 The second point, Your Honor, independent of what we
10 believe is the undisputed evidence of no breach, that I want to
11 emphasize here is that SCO is estopped from pursuing its theory
12 of the case. For almost two decades following the execution of
13 these agreements, some of these representatives of AT&T and USL
14 and Novell and others, told IBM and other licensees that they
15 could do as they wished with their own original works, so long
16 as they protected AT&T's UNIX System V software.

17 Mr. Wilson, the head of the licensing business, said
18 he on numerous occasions did that. Mr. Frasure, who executed
19 the agreement on behalf of IBM, as you'll see at tabs 25 and 26
20 of your book, said, quote, that he personally, quote, assured
21 licensees in no uncertain terms that they could do as they
22 wished with their original works. He, quote, often told people
23 that UNIX licensees could freely use and disclose their
24 original or homegrown UNIX method, code and concepts.

25 Mr. Green, another AT&T representative, also at USL

1 and Novell, has testified that, quote, more times than I could
2 remember, close quote, licensees were told that they could do
3 as they wished with their original works.

4 Ms. Tilley of AT&T, then USL, then Novell, said that
5 representatives of AT&T and USL and Novell, quote, consistently
6 informed licensees that they owned their code and that they
7 could do with it as they wished.

8 Mr. Crab, formerly of Santa Cruz and then of Caldera,
9 said that while at Santa Cruz, Santa Cruz told licensees that
10 they were free to do as they wished with their own code,
11 modifications and derivative works, so long as they protected
12 AT&T's System V source code.

13 AT&T and its licensees, Your Honor, took AT&T's
14 licensees like IBM and Sequent, took AT&T at their word. They
15 publicly disclosed their own original works in the time
16 following the execution of these agreements. Examples of those
17 disclosures are in the papers we have provided. There is a
18 cart with books in front of Your Honor in which repeated
19 disclosures were made over decades of the code and the methods
20 and the concepts of AT&T's UNIX System V software. And, Your
21 Honor, of the modifications and supposed derivative works of
22 that. Hundreds of books have been written on the subject.
23 Those disclosures are no different, Your Honor, than the kinds
24 of disclosures that SCO has included in its final disclosures.

25 Neither AT&T nor its successors raised any objection

1 to those disclosures until this lawsuit became a glimmer in the
2 eye of current management. SCO's former CEO, Ransom Love, has
3 testified that, quote, after Caldera acquired ownership of UNIX
4 code, and this is at tab 29, even though we were aware that IBM
5 was disclosing homegrown code, we made a conscious decision to
6 take no action against such disclosures. IBM, Sequent and
7 other licensees no doubt reasonably relied on the repeated
8 statements by AT&T and its successors that they could do as
9 they wished with their own works so long as they protected
10 AT&T. IBM and Sequent built businesses, Your Honor, on that
11 proposition and invested hundreds of millions of dollars in the
12 idea that they would actually control their own stuff.

13 Estoppel can, no question, be in certain
14 circumstances a fact intensive inquiry. It is not always
15 appropriate for summary judgment. Courts can and they do enter
16 summary judgment on grounds of estoppel, and I would
17 respectfully submit, Your Honor, that if there is a case for
18 it, this is it.

19 Third point, Your Honor, the alleged breaches here
20 have been waived. They have been waived for three reasons.
21 They have been waived because the repeated statements of AT&T
22 and its successors over nearly two decades not only amount to
23 estoppel but they amount to waiver. I won't repeat that
24 ground.

25 The second reason why there is waiver here, Your

1 Honor, is that Novell, the supposed predecessor interest to
2 SCO, exercised its rights under an asset purchase agreement
3 with the Santa Cruz Operation, Inc. to waive the alleged
4 breaches here. I will come back to that.

5 The second item I would like to focus on, Your Honor,
6 is SCO's own conduct which we believe results in a waiver of
7 alleged breaches here.

8 First, Your Honor, with respect to Novell. Section
9 4.16B. If you look at tab 36 of the book, Your Honor, after
10 the commencement of this case Novell exercised its rights under
11 Section 4.16B of the asset purchase agreement to cause a waiver
12 of the alleged breaches here. The asset purchase agreement
13 says that seller, in this case it was Novell, shall amend -- in
14 addition, seller in its sole discretion, buyer shall amend,
15 supplement, modify or waive any rights under, or shall assign
16 any rights to any SVRX license to the extent so directed in any
17 manner or respect by seller, Novell.

18 In the event that the buyer fails to take such
19 action, the seller, Novell, shall be authorized and is granted
20 the right to take that action on the buyer's behalf. Well, it
21 is undisputed here that Novell, following the commencement of
22 this case, exercised its rights under 4.16B. In the dissent
23 letter it asked SCO to waive, and SCO declined to waive and
24 Novell took that action. The only issue is whether Novell has
25 the right to do that.

1 I respectfully submit, Your Honor, that the plain
2 language of Section 4.16B gives Novell that right. SCO has
3 raised a number of arguments in opposition, some as to the
4 parol evidence, and some as to the plain language of the
5 agreement. We deal with those arguments in our papers and at
6 tabs 38 and 39 of the book. Time won't allow me to repeat them
7 here.

8 Let me just say this about SCO's argument. SCO's
9 reliance on the parol evidence is we submit impermissible, Your
10 Honor, because the plain language controls, and the parol
11 evidence cannot be used to alter the plain language of the
12 agreement. As to the plain language of the agreement, what SCO
13 says in effect, Your Honor, is that Novell had waiver rights,
14 but it doesn't have waiver rights to the agreement that are at
15 issue in this case, the agreements that IBM is supposed to have
16 breached. The waiver rights by the terms of Section 4.16B
17 relate to SVRX licenses. The question is, are the agreements
18 at issue here SVRX licenses? As we show at tab 40 in Your
19 Honor's book, I submit there is no question that they are.
20 SVRX stands, Your Honor, simply for System Y release. There is
21 no question that the agreements IBM is supposed to have
22 breached are SVRX licenses. They are agreements licensing
23 System V releases.

24 In a letter from SCO's CEO to the CEO of Novell,
25 following Novell's exercise of its rights under 4.16B,

1 Mr. McBride acknowledged that the agreements at issue in this
2 case are SVRX licenses. He said, and I quote, in your June 9
3 letter, you, referring to Novell, attempt to assert claims on
4 behalf of IBM and with respect to its SVRX licenses with SCO.
5 In SCO's opposition papers, Your Honor, in connection with this
6 exact motion, at paragraph 201, SCO acknowledges that the
7 agreements at issue are SVRX licenses. It says, quote,
8 effective June 13, 2003, SCO terminated IBM's SVRX license.
9 Effective July 30, 2003, SCO terminated the Sequent SVRX
10 license. Novell has waived the alleged breaches at issue.

11 The next waiver issue I would like to discuss, Your
12 Honor, concerns SCO's conduct. This is summarized at tab 41.
13 SCO shipped the exact four categories of code material we're
14 talking about, Your Honor, in its own product. It shipped it
15 in its United Linux product, and it shipped it in that United
16 Linux product pursuant to the terms of the General Public
17 License or the GPL. Each of those acts resulted in a waiver of
18 the alleged breaches. Let me tell you why.

19 First, United Linux. If you look at tab 43 of the
20 book, Your Honor, SCO was part of an initiative known as United
21 Linux. As a part of that initiative SCO and its partners
22 assigned any intellectual property rights they had, with the
23 exception that is not relevant here, to the material that ended
24 up in United Linux product. The material at issue here is in
25 the United Linux product. If you take a look at, Your Honor,

1 tab 44 of the book, you'll see the language of the United Linux
2 agreements. The United Linux Joint Development Contract says
3 that all intellectual property rights in the software developed
4 pursuance to the JDC, other than the preexisting technology and
5 enhancements, shall be assigned by the members, which SCO is
6 one, and any individual member to the LLC and shall be owned by
7 the LLC.

8 Well, SCO's Linux IV product was, Your Honor,
9 software developed pursuant to the JDC. We show that at tabs
10 44 and 46 of the book. Again, the items of information that is
11 supposedly misused here was in that product. Any rights SCO
12 had to the material at issue, Your Honor, and we respectfully
13 submit they had none, but any rights they had were assigned by
14 them to the United Linux LLC, and they are in no position now
15 to assert any claim of breach with respect to it.

16 With respect to the GPL, the General Public License,
17 again, SCO shipped the material at issue in products that were
18 licensed under the GPL. What does the GPL say? The GPL says,
19 among other things, that if you distribute copies of the
20 program covered by the GPL product or for a fee you must give
21 the recipients all the rights that you have. You must make
22 sure that they too receive and can get the source code. You
23 give them the right to make copies and to distribute verbatim
24 copies. So the very material that supposedly represents the
25 breach was put by them in a United Linux product and shipped

1 under the General Public License under those terms. That, too,
2 Your Honor, represents a waiver.

3 Now, if I may, as time is short, with respect to the
4 technology items at issue, and let me say this again, there are
5 four of them. I would point you to tab 53 of the book where
6 they are listed. The facts related to these four technology
7 area are at tab 54 of the book. These four items of technology
8 have one thing in common. That one thing is dispositive of
9 SCO's claims. That one thing is that none of those four
10 categories of material is resulting material. Under their
11 theory of the case, Judge, IBM's liability depends at a minimum
12 on it being resulting material. They are not, therefore, the
13 claims fail. None of the four categories include System V
14 methods or concepts, none of them are modifications and
15 derivative works of UNIX System V. They are original IBM
16 works, just as in my example of the 990 original works of Your
17 Honor, and SCO has under the plain language of the agreement,
18 we submit, no right to control them.

19 There are four, as I said, Your Honor. The JFS
20 contribution is at issue in the next motion, and with Your
21 Honor's permission, I will argue that in that connection. Let
22 me just focus on the three remaining ones, the RCU
23 contribution, the LTP contribution, and the negative know-how
24 experience. The RCU contribution is at tab 58. Putting aside
25 the fact that it is not resulting material, and putting aside

1 the fact that SCO has waived any right to pursue it, SCO's
2 claim with respect to the RCU contribution is barred by the
3 statute of limitation. The statute of limitations under New
4 York law, which controls, is six years. RCU was disclosed in a
5 patent application in 1993 and the patent issued in 1995.

6 Under SCO's mistaken theory of the contract, Your
7 Honor, IBM's filing of the patent application amounts to a
8 disclosure. The statute of limitations ran before the
9 commencement of this claim and the claim is barred.

10 In any event, the witnesses, the only individuals
11 identified by SCO as having anything to do with that, and whose
12 pictures and testimony appear at tab 60, have debunked SCO's
13 claims.

14 The LTP contribution. Again, putting aside the fact
15 that it is not resulting material, putting aside the fact of
16 waiver and estoppel, SCO's claim with respect to the LTP
17 contribution fails, Your Honor, because it depends on the
18 proposition that the LTP contribution came from the DYNIX
19 operating system, which SCO contends is a modification and
20 derivative work. It didn't.

21 The LTP contribution was not part of the DYNIX
22 operating system. The evidence, which we set out at tab 62 of
23 the book, makes that perfectly clear. It was not a part of it
24 and under their own theory it fails.

25 Lastly, Your Honor, the negative know-how category.

1 This is a category of 11 items of supposedly misused
2 information. We lay this out at tab 64. There are two basic
3 brands of claim as it relate to these 11 items. One of them
4 concerns experience. Here is what SCO's claim is as it relates
5 to the experience. It says, as we show at tab 65, Judge, it
6 says IBM has breached its contract by permitting IBM developers
7 exposed to DYNIX PTX methods and concepts to contribute to
8 Linux in the same area for each developer's work. So anybody
9 that had any exposure to DYNIX can't work in connection with
10 any other operating system in that area. That is the claim.

11 With respect to the negative know-how, which also
12 appears at 65, the gist of the claim is that people who had
13 some knowledge about DYNIX told people who were working on
14 Linux not to do certain things in DYNIX that they don't think
15 worked. SCO has identified 16 supposed wrongdoers as it
16 relates to these 11 categories.

17 Those individuals, Your Honor, as I will come to,
18 have offered undisputed testimony that debunks SCO's claim.
19 The claims as to these 11, Your Honor, fail for three quick
20 reasons, and I will sit down.

21 First, Your Honor, the agreements which SCO contends
22 were breached, Your Honor, do not contain any provision which
23 would allow it to preclude IBM employees from using their
24 experience and their general know-how in working on projects
25 other than the one on which they are presently working. There

1 is no connection drawn in SCO's interrogatory answers or in its
2 paper between the contract and this claimed notion of misuse of
3 experience.

4 Second, Your Honor, though Magistrate Judge Wells
5 allowed SCO to pursue, and declined to throw out in the
6 discovery phase SCO's claim as to these 11 items, she made it
7 perfectly clear in her order, which we have set out in your
8 Honor's binder, that these claims were subject to being, in her
9 judgment, at least, disposed of on summary judgment.

10 Your Honor ordered SCO to provide particularity as to
11 these claims as did Magistrate Judge Wells. That has never
12 been provided, and for that reason alone they are out.

13 Finally, careful consideration of these items shows
14 that the claim falls apart. If you look at tab 70, Your Honor,
15 you will see the pictures of each of the 16 individuals who are
16 at issue and what it is they said in testimony that is
17 unrebutted by SCO. Here is what they said. They didn't make
18 any contributions to the files or the directories listed, or
19 they didn't base their contributions to the list of files on
20 UNIX System V in making the contributions.

21 You will want to look item by item. Your Honor, look
22 at tab 71. For two of these items, and, again, this is
23 undisputed, for two of these items, Your Honor, 188 and 187,
24 the technology which SCO alleges was misused didn't even exist
25 in DYNIX. For another two of the items, 43 and 94, the

1 material had nothing to do with DYNIX PTX. It was discoverable
2 outside of IBM. For five of the items there is absolutely no
3 evidence that the alleged wrongdoers had any experience in the
4 technology area where they were supposed to have misused it in
5 some other area. SCO admits that with respect to four of them.
6 With respect to items 23 and 90, Your Honor, for two of the
7 items the material was disclosed in marketing materials, and in
8 footnote ten of SCO's opposition papers, it says that any such
9 disclosure -- if the material is actionable anyway. Finally,
10 item 189, Your Honor, was based on knowledge available in
11 public literature.

12 As is summarized in tab 72 of the book, SCO's
13 negative know-how claims and its experience claims we think
14 underscore the absurdity of the position. If SCO's theory is
15 correct that anybody with any experience, not just with UNIX
16 System V, but any modification or derivative work of UNIX
17 System V, is severely constrained in their employment, and that
18 is contrary to public policy as the cases in our papers make
19 clear.

20 The only conceivable reason, the only conceivable
21 reason why AT&T could have wanted to protect IBM, and in my
22 example Your Honor's original works, was to protect the one
23 item that you put in your product. SCO has acknowledged, Your
24 Honor, and it did it early in the case, that there are no
25 secrets in UNIX System V. They said that in open court and

1 they withdrew their trade secrets claim.

2 SCO's theory is, finally, inconsistent with IBM's
3 rights of ownership. It admits that IBM owns the material at
4 issue. It admits that ownership carries with it the exclusive
5 right to distribute, and yet they take the position, Your
6 Honor, that would nullify as a practical matter IBM's rights of
7 ownership.

8 Thank you.

9 THE COURT: Thank you.

10 Mr. Singer.

11 MR. SINGER: Thank you, Your Honor. We also have
12 arguments books, if I might approach?

13 THE COURT: Please.

14 MR. SINGER: Your Honor, I would like to begin with
15 why these contract claims matter. The UNIX operating system
16 developed by AT&T was its crown jewel. It is the operating
17 system of choice for mission critical application, and it
18 became in the 1990s the leading operating system worldwide.

19 Now, major computer companies like IBM wanted to
20 adopt that system for their own hardware. They had a choice.
21 They could come up with their own operating system. In fact,
22 IBM tried. It is called OS2. It failed. IBM, like others,
23 struck a deal with AT&T. Give us access to your source code so
24 that we can develop our own flavor of UNIX that will run better
25 on our hardware. AT&T agreed but subject to very strong

1 restrictions, and not just on the original System V code, but
2 on what they knew IBM and others would do with it, the
3 so-called modified and derivative works.

4 They required that those modified and derivative
5 works be treated just like the original software code in
6 language that is as plain as can be in the relative agreements
7 that are enforceable today. That is why we are here.

8 AT&T preserved its head start in developing UNIX
9 while allowing companies to, for a royalty, develop their own
10 systems that were UNIX systems that, of course, would pay
11 royalties for the object code that would run the various
12 machines. What they could not do is exactly what IBM has done
13 here, give away that head start by open sourcing of derivative
14 technology that they would never have had if it weren't for
15 access in the first place to System V, and to allow a
16 jump-start to Linux, which has had a tremendous effect on SCO's
17 business. SCO was the inheritor of AT&T's UNIX business. SCO
18 dominated with UNIX on the Intel chip platform market, and it
19 had 80 percent of the market in the late 1990s.

20 It did ventures with IBM, as you'll hear more about
21 this on Monday when we have our unfair competition argument,
22 but a joint venture project, Monte Ray, to use SCO's know-how
23 in that field to develop joint products. IBM then decided to
24 abandon project Monte Ray, and instead to devote technology to
25 Linux and to disclose proprietary UNIX technology. At tab one

1 we just touch on a little bit of that, which is the experts',
2 Mr. Rochkind's and Mr. Ivie's conclusions that IBM's
3 disclosures is what turned Linux into a strong enterprise
4 system.

5 If you turn to the third page, in tab one you see a
6 graphic where IBM's own document shows it directed the strength
7 of AIX and PTX, which is DYNIX, into Linux as their proposed
8 UNIX strategy. You have a summary of the vast amount of
9 technology just on the issues which are still subject to the
10 Court's order in the case, substantial amounts of technology
11 that have been contributed. You have Mr. McKenney, who is an
12 IBM secret programmer, who expressly stated in a document that
13 we will mine key ideas from AIX and DYNIX PTX, and that this
14 will make Linux more disruptive to proprietary operating
15 systems like SCO's business. And the reason they can do this
16 is because they have access to DYNIX PTX source code and access
17 to top operating system experts in AIX and DYNIX.

18 The result, which is depicted graphically on the last
19 slide in section one, is the rapid decline in SCO's open server
20 UNIX new license revenue following those technologies being
21 distributed in early 2000. That is why these contract claims
22 matter a great deal.

23 I would like to address at the outset why a trial is
24 needed, and why this is not a matter for summary judgment. One
25 might think that that is obvious just from IBM's presentation.

1 There are hundreds of pages of briefs, reply papers and
2 addendum that are longer, I think, than War and Peace. 40,000
3 pages of exhibits. We counted 100 plus new cases just cited in
4 their reply brief. That does not sound like a summary judgment
5 case to us, Your Honor. It does not sound like a case where
6 you can look at the plain language and you can say SCO does not
7 have a contract claim.

8 I think that it is also clear when we look at the
9 extrinsic evidence that IBM is so heavily relying upon, and
10 because you're talking about both things that occurred over two
11 decades ago, in part, and because you're talking about terms
12 that are not clearly defined, like what does someone mean when
13 they say an original IBM work? What do they mean when they
14 say, as you heard on the screen, that it was developed without
15 relying on System V?

16 Let's take a look at some of those witnesses just at
17 the front end, and their changes of opinion at different points
18 in the case. If you look at tab two, the first slide is Otis
19 Wilson. He says, as you heard, his beliefs as set forth in a
20 declaration that IBM and Sequent are free to open source all of
21 AIX and DYNIX except the original System V code. 14 years ago,
22 however, he gave strikingly different and contradictory
23 testimony in a case, USL versus Berkeley, where he said that
24 anything that that university created with the exposure to
25 licensed software based on, contained a part of, was a

1 derivative work and had to be treated as a licensed software,
2 which is, of course, what the plain language of the agreement
3 says.

4 He also wrote that in a 1987 document. He also
5 confirmed that that testimony was correct at his deposition,
6 and he acknowledged it was no different in intent between a
7 standard operating license and the educational license at issue
8 in that case.

9 On the next page we talk about Mr. Kistenberg,
10 another one of the IBM acknowledged involved persons. He
11 negotiated the Sequent deal on behalf of Sequent. They have a
12 declaration from Mr. Kistenberg that said no one at AT&T had
13 intended to assert control over the portion of derivative work
14 that did not contain System V code. He told a different story
15 in his deposition.

16 In fact, he said in his deposition that he told IBM's
17 counsel that his understanding was that the UNIX software given
18 to any of the licensees, that any time they used the source
19 code to develop derivative products, that that was a part of
20 the System V source code, and that they could not turn around
21 and give it to X, Y, Z companies. He states that clearly at
22 various places in his deposition. He says in his deposition
23 that he would never have signed that declaration if he knew the
24 use that IBM would try to interpret his words to mean.

25 Mr. Chatlos, in fact, did exactly that. When he was

1 confronted with a proposed IBM declaration following the
2 meeting, he said he would sign one that actually reflected what
3 he had discussed, but that the ones presented to him didn't do
4 that and he refused to sign.

5 Mr. Bouffard had his declaration submitted by IBM
6 and, again on the key point we're talking about, these are not
7 collateral points, but it is the key points that IBM wants you
8 to overturn the plain language of the agreement and go with
9 extrinsic evidence on. They have a declaration from Mr.
10 Bouffard. He gives a later declaration to SCO which clarifies
11 that when he said there was no right to control or own the
12 modifications, he meant that AT&T couldn't appropriate such
13 material, and said to IBM give us the AIX and we want to sell
14 it for our benefit. And that he did not mean that IBM had the
15 right to disclose the protected added on material and other
16 code that was in the derivative product. That is directly
17 contrary to his declaration and the position that IBM takes in
18 this case.

19 Just recently in the Novell case, he gave a
20 deposition and that is the next page which is excerpted here,
21 where he was asked by Novell's counsel as to how it came to be
22 that he signed the declaration that said that ownership and
23 control was with IBM, and he explained that his IBM declaration
24 wasn't written by him, that they went around and around in
25 negotiating the language, and that finally he was worn down.

1 He said it wound up being a negotiation of my words rather than
2 a document of my words.

3 Your Honor, this and the other extrinsic evidence is
4 exactly why we have trials. We want to subject these witnesses
5 to the crucible of cross-examination, and then the truth we
6 believe will emerge. That cannot be shortcut in this case.

7 I would also like to talk about the assertion that
8 was made that the particular derivative works at issue in this
9 case are just things that were dropped in and had no basis
10 related to System V. That is manifestly not the case. I would
11 like to move all the way to tab 50, if you would, in the binder
12 which we provided.

13 This deals with AIX. It is an excerpt from the
14 report of Mr. Evan Ivie, who was formerly the head of the
15 computer science department at Brigham Young. He has worked on
16 UNIX all the way back to AT&T. He is a distinguished expert in
17 the field. He has studied this, and as his report and
18 underlying testimony show, half of the JFS files were based on
19 System V source code. If you turn to the second page there we
20 go into a little more detail. Mr. Hatch in the argument later
21 this afternoon will even have even more detail on this. He
22 points out that in 1990 or 1991 the first JFS was based on the
23 preexisting system that was derived from UNIX source code
24 licensed from AT&T, and that approximately half of those files
25 were based on UNIX System V source code. How does he know

1 that? Because if you go back into the discovery of that, they
2 have origin codes where IBM is included within AIX indicating
3 that those came from System V.

4 Now, there is a dispute as to whether or not IBM
5 created the JFS system that was contributed to Linux in a clean
6 room environment from OS2, their own operating system.

7 THE COURT: Hang on a second.

8 MR. SINGER: Do you need a moment?

9 THE COURT: Go ahead, Mr. Singer.

10 MR. SINGER: Your Honor, that is a disputed fact as
11 to whether or not it came out of OS2 because we have competent
12 expert testimony saying it came from System V.

13 In addition, we have admissions, such as an IBM
14 programmer, who said, and this is also at tab 50, that the
15 System V file system is where this stuff, referring to JFS,
16 where this originated. It couldn't be more black and white
17 than that.

18 Mr. Davidson's declaration is also further support of
19 the fact that JFS is not some system that just was dropped into
20 AIX and had no relationship to System V and now they are
21 seeking protection over it. It itself was derived from System
22 V.

23 At tabs 51 and 52 we have a similar analysis with
24 respect to the origins and the relationship of DYNIX RCU.
25 These are not things that were just dropped in and that were

1 extracted to give to Linux. These were interwoven with the
2 DYNIX operating system. DYNIX wouldn't operate without them,
3 and those were operating in a DYNIX environment, and they are
4 by every meaning of the word derivatives.

5 Now, Your Honor, I would like to go back now to the
6 legal argument and begin with the fact that there are four
7 claims. We disagree with IBM on the issue regarding
8 sublicensing contracts. They had no separate agreement about
9 it in their initial brief. They said, which we agreed, that
10 they depend on the original underlying primary source code
11 agreement and, therefore, if there is a breach of the software
12 agreement, there is also a breach of the sublicensing agreement
13 for distributing material in violation of the software
14 agreement, and Section 3.03 of the sublicensing agreement makes
15 that clear.

16 Now, there are four and only four legal arguments
17 made by IBM in their summary judgment briefing, their initial
18 briefing, not their reply brief. I will deal with those here.
19 We urge the Court to disregard all the new and additional
20 arguments put into the reply papers that were not raised in the
21 initial papers.

22 Turning to the plain language, Section 2.01 says that
23 the right being given to IBM includes the right to modify the
24 software product and to prepare derivative works based on such
25 software product provided the resulting material, which we

1 submit are the derivative works, are treated hereunder as a
2 part of the original software product. That means treated just
3 like the System V code.

4 What does that language not say? It does not say
5 what IBM suggests. It does not say that IBM is free to take
6 any part of this and distribute it to whomever they wish in
7 source code form. The contract between what IBM's position in
8 this case is, and what the agreement says, could not be clearer
9 than just contrasting the two. In IBM's brief they say that
10 IBM owns and is free to disclose any material that Sequent
11 created so long as it does not contain UNIX System V material,
12 and, as we have seen, that is simply not what 2.01 says.

13 Section 7.06, another part of that agreement, also
14 makes it clear that the licensee has to hold all parts of the
15 software product subject to this agreement and in confidence
16 for AT&T, that it may distribute products only to third parties
17 having licenses of equivalent scope, and that the licensee may
18 obtain materials based on the software products subject to this
19 agreement from such a third party, and use such materials,
20 provided that the licensee treats such materials as if they
21 were a part of the software product. Think about what that
22 means. IBM is restricting itself to use materials based on a
23 software product, not the software product as they say just
24 System V, but just based on that from a third party, but can
25 only use those materials if they treat them as part of the

1 software product itself. That is just like 2.01 suggests.

2 Now, what IBM does not spend any time on are the side
3 letter and amendment X, which clarified and modified in certain
4 respects the IBM AT&T agreement but not the Sequent agreement.

5 We have dealt with that in our briefs because those support our
6 position. They gave ownership rights over derivative works to
7 IBM, but did not give them a release from the control rights
8 and they could not disclose the source code to others. That
9 was clear under 706(a) which appears in the '85 letter. These
10 are by way of tab 8 in the book. The 1987 letter continues to
11 protect all parts of derivative works. It indicated that a
12 third-party breach of derivative works cannot do so if it is
13 based on all or any portion of such a derivative work, which is
14 inconsistent with the position IBM takes here today.

15 In 1996 they had an amendment X which had an
16 illustration attached at 3.7, and that illustration was that if
17 company A, a sublicensee, is a general computer system
18 manufacturing system, and it said IBM may not distribute source
19 copies to that company for purposes of making modifications to
20 adapt the sublicensed product as a general operating system for
21 the company's general computer hardware system. But yet they
22 maintain here that they can open source that to the world to
23 come up with competing operating systems. Their position
24 simply cannot be squared with the plain language of the
25 agreement.

1 There would be no purpose for the language we saw in
2 2.01 talking about the derivative works if all that was
3 protected was the original course code. You wouldn't need
4 that. The source code would then have its own protection. The
5 only sense that makes is if the derivative works, the resulting
6 work is protected.

7 Now, Your Honor, there is no factual dispute that AIX
8 and DYNIX PTX are derivative works within the meaning of
9 Section 2.01. At tab 10 in the binder we provide the expert
10 testimony on that point, and admissions from both Sequent and
11 IBM people that these are derivative operating systems based on
12 System V. We would submit that the combination of that plain
13 language, and the expert testimony together with the plain
14 meaning of the Sequent agreement, is why we're entitled to
15 partial summary judgment on Sequent on the ground, one, that
16 Section 2.01 means what it says, that the derivative work has
17 to protect like the original product and, two, that DYNIX is in
18 fact a derivative of System V, because that is not disputed at
19 either the expert level or the level of the admissions which we
20 have put into the record and excerpted at tab 10.

21 Your Honor, for that reason we don't believe it is
22 necessary to turn to parol evidence in this case. There is an
23 integration clause that would even exclude doing so. However,
24 the parol evidence is sharply disputed and it would require a
25 trial. If one turns to tab 13, and I have already touched on

1 this subject with respect to certain declarations from the very
2 witnesses who IBM relies upon, but beyond that there are over
3 20 witnesses, 20 witnesses who are involved with AT&T and
4 Novell and Santa Cruz in the negotiations, in the
5 administration, in the enforcement of these agreements, who
6 contradict IBM's contract interpretation.

7 I don't have time to go through here now all of this
8 testimony that is in the record and excerpted at tab 14, but it
9 is directly on point.

10 Mitzi Bond, for example --

11 THE COURT: You said 14. Do you mean 13?

12 MR. SINGER: It is 13 that I am referring to right
13 now, Your Honor.

14 THE COURT: Okay.

15 MR. SINGER: Behind tab 13, which is the chart, there
16 are excerpts from each of this witnesses and declarations or
17 depositions.

18 Just to touch on one, Mr. Guffey, who during the
19 relevant time period, '80 to '85, was the head of the software
20 services division which included UNIX, and he said I believe
21 that the members of my division and other AT&T employees
22 involved in licensing UNIX share the foregoing understanding
23 because it was a common subject in training and discussion.

24 The licensee was obligated to keep all parts of those
25 modifications and derivative works confidential, including the

1 methods and concepts embodied in those modification and
2 derivative works, just as the licensee was required to keep all
3 parts of the UNIX software product confidential.

4 If one turns to Burn Levine, who was an attorney at
5 the time involved with these agreements at AT&T, and he said
6 nothing in the agreement reduced AT&T's protection for UNIX
7 software, and that it was not limited to the disclosure of just
8 little source code.

9 Beyond those witnesses, let's turn to some of the
10 very witnesses who IBM relies upon. If we turn to tab 16, we
11 have again Mr. Kistenberg who says exactly the opposite of what
12 IBM relies upon in connection with the testimony that you have
13 heard earlier from IBM. If we turn to tab 17 you have Mike
14 DeFazio who was there and he supports IBM's position, but he
15 concedes that he really relied on Martin Pfeffer who was the
16 general counsel, who had primary responsibilities for
17 supervising the drafting of these agreement, and Mr. Pfeffer
18 supports our position.

19 You have at tab 18 Otis Wilson, and Mr. Wilson, as we
20 have seen, contradicted his position that he takes now, closer
21 to the time in the USL case, where he gave sworn testimony and
22 where he said anything that created an exposure to the licensed
23 software or was based on or was a derivative work had to be
24 treated in that way.

25 We have seen with respect to David Frasure, tab 19,

1 another one of the individuals up on the scene, that he
2 specifically said in the USL versus Berkeley case that the UNIX
3 source code had been instrumental in its development, and that
4 that is why it cannot be freely distributed by Berkeley.

5 Mr. Vuksanovich, the other gentleman up there at tab
6 20, says that if there is a single line of UNIX source code in
7 a modification or derivative work, then that modification or
8 derivative work has to be treated like the software product
9 that has been licensed under the agreement. He agreed with
10 that. So clearly this is a case where both the subsequent UNIX
11 agreement and the testimony requires a trial.

12 One final point on that, which is at tab 23. That is
13 that there are documents from IBM that are also inconsistent
14 with what IBM maintains today. This was an analysis of these
15 very agreements done by IBM. We put the whole document behind
16 tab 23 for the Court to read. This analysis was done in 1989,
17 and specifically concluded that all copies of the derivative
18 works of UNIX source code must be treated in exactly the same
19 manner as the UNIX source code as received from AT&T. Nowhere
20 in this document is there any mention that they could extract
21 parts of the modifications and the derivatives and do with them
22 what they would. That is something that is a position taken in
23 this litigation.

24 Your Honor, they talk about the parade of horribles
25 that will occur if this interpretation is afforded. That is

1 simply not the case. There are only two derivative works at
2 issue, AIX and DYNIX. IBM can use that technology to market
3 product, and they can come up with their own independent
4 operating system, and their employees are not restricted in
5 their work, they simply can't open source the result of that
6 work if it is based on System V.

7 So the consequences of agreeing with our
8 interpretation is simply that our contract is upheld, we
9 receive damages, we receive an injunction against further
10 violations to prevent this head start from being dissipated and
11 being given away to Linux. No other company that we're aware
12 of has done what IBM had tried to do, even though there have
13 been many licensees. None of them have come in here and open
14 sourced their source code in the manner that IBM has to enhance
15 Linux.

16 Your Honor, we have put in the book as well the
17 various legal authorities as to why this interpretation is
18 reasonable. There has been a dispute of experts between
19 Mr. Willick, who they submit, and Mr. Popono, who is a
20 professor at Harvard Business School, and at trial I think that
21 will be interesting testimony, and certainly not something that
22 the Court needs to deal with on summary judgment.

23 Now, with respect to estoppel, at tab 27 we include
24 the fact that estoppel is an issue of fact that we would submit
25 is inherently unsuited for summary judgment. The requirements

1 are that there be some concealment of a material fact by us,
2 and some lack of knowledge regarding these contracts by IBM.
3 That simply is not feasible in this situation.

4 First of all, you have an integration clause which
5 said that the parties can only change the agreement by a signed
6 agreement in writing. IBM knows that even if it were true that
7 some people told them, well, disregard this and don't believe
8 that, they knew that the only thing they could rely on was a
9 change in writing, and that is in the agreement, and that we
10 submit is why IBM went to the trouble of getting those side
11 letters in 1985 and 1987 and negotiating amendment X in 1996.

12 That is how these things are changed.

13 The case law we cite at tab 28 in our brief say that
14 that is an integral matter for an estoppel claim. Certainly
15 there can be no concealment of material facts when what
16 allegedly is being concealed is the plain language of the
17 contract. Now, beyond that there is no competent evidence that
18 establishes that AT&T or any of its successors told IBM or
19 Sequent that they could simply do as they wished.

20 That library shelf of books which was brought in
21 here, there is nothing shown that the specific technology that
22 is at issue in this case is disclosed there. Many of those, we
23 would submit all of those, have copyright notices, so to the
24 extent there is information it is still protected by our
25 copyrights. They talk generally about System V but don't

1 disclose the information here. They are welcome to roll in
2 that cart we submit to the jury in this case and make that
3 argument, but that is certainly not a part of a summary
4 judgment proceeding.

5 Now, as to the witnesses who they claim say that AT&T
6 gave them these assurances to do as they wished, that is
7 sharply disputed. Your Honor, turn to tab 30, if you would, in
8 the binder. You see there over a dozen witnesses on those two
9 pages that flatly dispute that they or anyone they worked with
10 at AT&T or Novell or Santa Cruz ever told licensees that they
11 could disregard the plain language of those agreements. At a
12 minimum, even if that is a legally tenable argument for
13 estoppel, it is subject to a factual dispute.

14 Your Honor, specifically, Doug Michels testified, and
15 this is at tab 31, that when there was a concern at Santa Cruz
16 that IBM announced support for Linux, he went to talk to IBM
17 and they assured Santa Cruz, which is now SCO, that they would
18 not commercially harden Linux, and that they would not
19 substantially encroach on Santa Cruz's core market, so that
20 there was nothing here we had to worry about. Now they claim
21 that is estoppel and waiver. I submit that there cannot be any
22 evidence of reliance because IBM gave those rights no
23 consideration at all.

24 First of all, let's look at the fact, and they talk
25 about this in connection with waiver, with the distribution of

1 Linux, but who was distributing what when? When did IBM make
2 their Linux decision? IBM decided to pursue Linux and to
3 distribute technology beginning in '98, and they started the
4 Linux Technology Center in '99, and the first disclosures were
5 at the end of '99 and into 2000. At that time period, up to
6 May of 2001, these copyrights and contracts were owned by Santa
7 Cruz which was not in the Linux business. Caldera, which was
8 in the Linux business, did not own them. Caldera acquired them
9 afterwards, after they had already made this decision and gone
10 forward.

11 But beyond that, Mr. Frye, who is the very head of
12 the IBM Linux Technology Center, specifically denied that he
13 ever gave any consideration to any of these issues with SCO.
14 That is at tab 32.

15 Your Honor, in addition, at tab 34 you have
16 Mr. Sandve's e-mail from IBM, and Mr. Sandve specifically
17 states, because he was asked by one of his superiors, why can't
18 we let you look at the AIX source code? He says it was because
19 of the 5.3 source code license, and that it would take 50 to
20 \$80 million to buy it from SCO even if SCO would deal with it
21 right now. All these assertions of estoppel and waiver are at
22 a minimum factual issues which have to be decided at trial.

23 Very briefly with respect to the issue of Novell
24 waiving our rights.

25 By the way, one last point on IBM's suggestion that

1 Mr. Love waived his rights and that SCO made a knowing waiver.
2 Mr. Love, who IBM did not disclose to the Court, is a paid IBM
3 consultant, he contradicted that in a subsequent declaration,
4 saying that there was never an investigation while he was the
5 C.E.O. of these property rights. We have submitted
6 declarations, and this is at tab 40, from other members of the
7 board of directors and management directly contradicting his
8 testimony.

9 So all of these issues, and the United Linux issue
10 they raise, and it is treated in the copyright argument which
11 you'll hear later in the week, and they incorporated that in
12 their briefs and we incorporated it in our briefs, and that
13 will be later this week, and so will the issues concerning the
14 other waiver argument they made about our distribution of
15 Linux. At a minimum there are factual issues that preclude an
16 estoppel and waiver argument.

17 I would like to talk about the issue of Novell's
18 purported waiver of SCO's rights. This interpretation would
19 make a mockery, Your Honor, of the very asset purchase
20 agreement that was signed by the parties, where it gave the
21 whole business to SCO. The Court will remember the argument
22 about this in the Novell case a few weeks ago, and yet they
23 maintain that they can come in here and they can prevent SCO
24 from enforcing its intellectual property rights by a contorted
25 interpretation of Section 4.16. First of all, this issue is

1 resolved in the Novell trial.

2 Secondly, their position is simply flat wrong. If
3 one turns to tab 43, and Your Honor has seen this section, but
4 4.16 defines the SVRX licenses for purposes of this agreement
5 under item six of the schedule. That schedule does not list
6 these IBM agreements in item six. It lists them as a different
7 item, item three. That is where the software and sublicensing
8 agreements at issue here are listed. At a minimum, there is an
9 ambiguity in that issue.

10 At tab 46 we present for the Court testimony from the
11 lead negotiators and the businesspeople on both sides of the
12 issue who agree that Novell had no ability to waive IP rights
13 with respect to the source code license at issue here. That
14 was limited to protect their binary royalties, which were
15 bought out in 1996, and had no continuing role. Both Chatlook
16 and Wilt, who were the negotiators for Novell and Santa Cruz
17 respectfully, and the other individuals on these pages all
18 agree, and more testimony is being developed every week in the
19 Novell case supporting this position, that they had no ability
20 to waive these rights.

21 That was made clear as well in an amendment in
22 writing to the APA. It is amendment number two, which is at
23 tab 44. It says that Novell has no right to increase any SVRX
24 licensee's rights to source code, and may not prevent SCO from
25 exercising its rights with respect to SVRX source code in

1 accordance with the agreement.

2 So their position, which may or may not be related to
3 the fact that IBM paid Novell about \$50 million right at about
4 the time of this waiver, is not supported by the plain
5 language. It is not supported by the extrinsic evidence. It
6 is contrary to the entire purpose of the agreement. In any
7 event, it will be resolved in the Novell trial.

8 Briefly on the statute of limitations, their final
9 argument, that breach arose from open sourcing to Linux. That
10 is not the same thing as a patent which restricts the use to
11 IBM. Only IBM could use it. That would be consistent with our
12 agreement because IBM has the right to use it. Open sourcing,
13 which is what occurred during the period when the statute of
14 limitations had not run, it occurred only a few years ago, that
15 is what gives rise to our cause of action. IBM's patent,
16 therefore, does not begin the statute of limitations. Their
17 cases do not support that proposition.

18 Your Honor, at tab 49 we briefly point out what the
19 Court is well aware of, the fact that you cannot raise new
20 legal arguments in a reply brief for the first time. All of
21 these arguments that we heard at the end of Mr. Marriott's
22 presentation about this specific technology are not the four
23 arguments listed in their reply brief. We are not charged with
24 anticipating everything they might draw from all of the factual
25 material.

1 So in addition to the fact that that is new, we have put
2 in testimony related to each of these technologies at tabs 50,
3 51 -- these are all in the record -- 52, which indicates that
4 there is a factual dispute at a minimum with respect to these
5 technologies issues, rather than the legal issues which they
6 base their initial legal brief on, but now presumably they have
7 found some reason to want to raise new issues in reply.

8 Your Honor, we have established, as I mentioned earlier,
9 that our cross motion for summary judgment should be granted.
10 Their only real argument with respect to that is that you
11 should not issue partial summary judgment. They note that the
12 courts are in disarray on that issue. We believe that the
13 better authority is that you can and should issue such a
14 partial summary judgment. Alternatively, under Rule 56(d)
15 you're entitled, in fact, directed to make such findings if the
16 facts are not in dispute.

17 I would like to save the balance of my time for my
18 rebuttal on the cross motion.

19 THE COURT: Go ahead, Mr. Marriott.

20 MR. MARRIOTT: Thank you, Your Honor.

21 First, with respect to the plain language, the
22 provision on which SCO relies, Your Honor, says simply that
23 resulting materials are to be treated hereunder like software
24 product. Whatever precisely that means, Your Honor, the
25 categories of information that IBM is supposed here to have

1 improperly disclosed are not resulting materials. And,
2 therefore, the limitation, whatever precisely it is, on
3 materials covered by Section 2.01 is inapplicable.

4 Again, we're talking -- Your Honor, if I may approach
5 with a chart?

6 THE COURT: You may.

7 MR. MARRIOTT: If this is the one item, Your Honor,
8 that you licensed as your product as I described previously
9 from SCO, and that is subject to the terms of their agreement,
10 we didn't disclose that. Nor, Your Honor, did we disclose the
11 derivative work. The allegation is that IBM took pieces out of
12 its own original works and used them as it wished. Some of
13 them got put in different products. That, they say, is a
14 violation of the agreement.

15 That disclosure reveals nothing about this, and that
16 disclosure does not compromise the entirety of the product so
17 that there would be some reason to be concerned about that.
18 Taking this out and putting it here, Your Honor, does not mean
19 that that might be a derivative work, or it might not, and you
20 have to look at that particular thing. Is that a derivative
21 work? Under SCO's theory you might have an obligation to limit
22 what you do. If what you take out is not a derivative work,
23 Your Honor, then it is not subject to the provisions of 2.01 of
24 the agreement.

25 2.01, if it means anything, Your Honor, it relates to

1 precise terms, resulting materials. The things which IBM has
2 alleged to have taken out, that are not modifications or
3 derivative works or resulting material, can't possibly have
4 been distributed in violation of Section 2.01 of the agreement.

5 Parol evidence, Your Honor. Mr. Singer points to, as
6 I suggested he would, a long list of individuals who he says
7 have offered testimony to support SCO's case. He pointed to
8 the testimony from Mr. Wilson who he says, for example, has
9 offered contradictory testimony in a case in 1991. Your Honor,
10 time won't allow for a line by line recitation of that. Let
11 me, if I may approach, with one example.

12 In 1992 in the litigation to which Mr. Singer refers
13 and to which he claims Mr. Wilson offered inconsistent
14 testimony, Mr. Wilson offered testimony that is perfectly
15 consistent with the testimony he and the other individuals who
16 negotiated the agreement in this case have given. If you look,
17 Your Honor, at page 47, he says, quote, we did not -- we, AT&T,
18 did not want to have any rights or ownership to anything they
19 created. And yet SCO says that while we, IBM, may own our
20 stuff, they control it. Mr. Wilson said that in 1992 in the
21 litigation in which Mr. Singer claims he offered inconsistent
22 testimony.

23 If you turn to page 76 from that same case, Mr.
24 Wilson said, quote, the intent is what I have stated many times
25 earlier. In other words, the intent is such that we protect

1 our intellectual property, and assert no rights in the
2 licensee's intellectual property. Yet SCO asserts the right
3 forever to control IBM works original to it, the disclosure of
4 which couldn't possibly disclose anything owned by SCO.

5 Your Honor, the parol evidence offered by SCO is no
6 impediment to the entry of summary judgment, because the
7 individuals upon which it relies didn't negotiate and execute
8 the agreement. Your Honor can look at those and decide if
9 there is any contradiction. That testimony is overwhelmingly
10 in favor of IBM's construction.

11 To decline summary judgment here, Your Honor, is to
12 basically say that a reasonable jury could project the
13 testimony of the individuals who negotiated and executed the
14 agreements on behalf of IBM, and accept in its stead the
15 subjective understanding of individuals who might have been
16 employed at AT&T along with hundreds of thousands of others,
17 but who never communicated their subjective intent to IBM as
18 part of any negotiations. Under New York law, Your Honor, that
19 testimony is not capable of altering the plain language of the
20 agreement of impeding the entry of summary judgment.

21 The reasonableness of SCO's claim -- Your Honor, if
22 that operating system, if the DYNIX operating system, if the
23 AIX operating system were a General Motors car, and if the
24 chassis of that car, Your Honor, were licensed under the
25 agreements as SCO interprets them, that SCO, Your Honor, would

1 not only control the car in its entirety, but IBM would be
2 unable to take the dice off of the mirror of the car and do
3 what it wanted with those. It would be unable to take the
4 radio manufactured by Sony and put it in another car. It
5 couldn't take glass manufactured by PPG and put it in another
6 car. The design of the car could never be used in connection
7 with any other vehicle.

23 Section 4.16B. Mr. Singer says that IBM's
24 interpretation of 4.16B makes a mockery of the agreement. Your
25 Honor, under that agreement Novell retained the right to 95

1 percent of the royalties with respect to the licenses. It is
2 hardly a surprise that Novell would retain the right to waive
3 or to supplement or to change conduct that SCO might engage in
4 that could compromise Novell's interests. Mr. Singer refers to
5 amendment number two and suggests that that somehow is
6 inconsistent. Amendment number two, Your Honor, relates to
7 prospective buyouts. There is no prospective buyout at issue
8 here. There is no buyout at issue here. IBM's rights to
9 continue to distribute AIX were already bought out.

10 United Linux. Mr. Singer didn't to my knowledge
11 address United Linux, and it was raised in our papers, and
12 we'll discuss it on the 7th, Your Honor, in a different context
13 independent of what it means in the context of IBM's claim for
14 a declaration of non-infringement, it precludes SCO's claims
15 here. A general public license on that is similarly deferred.
16 It has independent meaning here to which SCO has not responded.

17 As to the four categories of alleged or misused
18 information, Mr. Singer suggested that that is somehow new in
19 the reply papers, Your Honor. I respectfully refer the Court
20 to the statement of undisputed facts in our opening papers. It
21 is not new. It was laid out and supported there by undisputed
22 testimony. If it is new, Your Honor, it is curious that
23 Mr. Singer's binder would have included a set of materials that
24 supposedly refute the testimony there.

25 These specific items at issue here, about which SCO

1 seems to skirt, Your Honor, are items which when examined
2 preclude SCO's claims. Mr. Singer refers to the RCU
3 contribution and he says it is not barred by the statute of
4 limitations because the disclosure was in a patent application,
5 and a patent application is subject to certain protections.
6 Your Honor, this case is not about misusing a patent, it is
7 about disclosure. Whether or not a person could practice an
8 invention, which is set out in a patent, is irrelevant to
9 whether the information which supposedly is secret, and
10 supposedly had to be kept confidential, was out there
11 sufficient to start the running of the statute of limitations.
12 The claim as to RCU is barred.

13 Mr. Singer said nothing, Your Honor, as a consequence
14 about the Linux technology project contribution, except to
15 suggest that experts had dealt with it. The expert testimony
16 on which Mr. Singer relies, Your Honor, is not only mistaken,
17 but it is testimony that Magistrate Judge Wells precluded SCO
18 from proceeding as to because it was not disclosed with
19 particularity in the final disclosures.

20 The e-mail on which SCO's expert, Mr. Rochkind,
21 relies in saying that the Linux LTP contribution was actually
22 from DYNIX is talking about a different set of LTP code than
23 that which is at issue in this case. Mr. Rochkind's testimony
24 is unsupportive of SCO's position.

25 Thank you, Your Honor.

1 THE COURT: Thank you.

2 Mr. Singer.

3 MR. SINGER: Your Honor, I suppose the short answer
4 is that if DYNIX RCU does not matter, and if JFS does not
5 matter and if they are like the dice on a car, then let's take
6 them out. Let them go into Linux and take them out. Let them
7 go into DYNIX and AIX and take them out and see what happens to
8 those systems then. These are interwoven, as our experts have
9 indicated, with the very operations of those systems, and those
10 systems as a whole are derivative of and they would not exist
11 but for System V.

12 Beyond that, we have shown direct links with respect
13 to JFS to System V. I quoted Mr. Ivie's testimony and it is in
14 record. I didn't hear Mr. Marriott say anything about it. It
15 is interesting that JFS was said by IBM people at the time, and
16 this is in the record, to be the most important contribution to
17 Linux.

18 With respect to RCU, at tab 51 you have testimony
19 from Mr. Rochkind, an acknowledged UNIX expert, showing that it
20 is in Linux and that the DYNIX code is a derivative of System
21 V, and that RCU is interwoven. So you can't simply take it
22 out. By the way, he also noted in his report that Linus
23 Torvell wrote that RCU was, quote, fundamental in summarizing
24 Linux 2.543 which was the first version to have that
25 contribution from IBM. He said the most fundamental stuff is

1 probably RCU and a program called Low Profile.

2 These are not dice hanging down on the dashboard,
3 these are integral contributions that are integral to DYNIX and
4 AIX, and they are derivative of our protected technology, and
5 now they have been wrongly disclosed.

6 The second point which has been made is that the
7 plain language does not support this, but they can't get around
8 the fact that the plain language in both that agreement and the
9 subsequent agreement never provide anywhere an invitation to
10 IBM to disclose materials that they add to these derivative
11 products that is not in someway based on these derivative
12 products. What we have are snippets of testimony from these
13 witnesses, that I submit really depend on what they mean when
14 they are being asked about original software products or IBM's
15 derivative products, and when you focus on the precise issue,
16 as the testimony we presented here throughout, indicates that
17 they say that it was the intent of AT&T to protect that. That
18 testimony, if you need to get to extrinsic evidence, is fully
19 admissible and at tab 14.

20 We submit that the cases from the Second Circuit,
21 saying if there is ambiguity, the Court should accept any
22 available extrinsic evidence, and that when you are dealing
23 with form agreements and how they are interpreted generally is
24 relevant, and these are form agreements, and that the course of
25 conduct under them is a strong indication of intent, aside from

1 the fact that virtually everyone up there who they call and
2 admit are involved persons have given contradictory testimony.

3 With respect to 4.16B -- well, first, with respect to
4 the issue of estoppel, the integration clause does more, Your
5 Honor, than simply say that parol evidence should be
6 considered. This integration clause says any changes to the
7 agreement must be made in writing. IBM knew that and they got
8 changes in writing, they just didn't give them the rights,
9 which IBM says that they have now, to do anything they wish
10 with those products, and that is why you have not heard very
11 much in this argument about those side letters or amendment X.

12 What that integration clause means is IBM cannot come
13 into court years later and say, oh, we relied on the fact that
14 someone else distributed a book that had a little bit of UNIX
15 in it or something and, therefore, we have the right to
16 disregard our contract. Or that we heard a licensee was told
17 by someone that you could do it with a derivative product.

18 That is directly in the face of the integration clause that
19 says if you want a change, you get it signed in writing.

20 Beyond that, there is a tremendous dispute where we have a
21 dozen witnesses who were there that said those things were
22 never said to licensees.

23 With respect to the Novell waiver, I didn't hear
24 anything about the fact that 4.16B's definition of the SVRX
25 license refers only to item six and that the IBM agreements in

1 issue here are in item three and are expressly not covered.
2 That was made clear in amendment two. He says, well, amendment
3 two is dealing with future buyouts. Amendment two was entered
4 into at the same time in 1996 and IBM bought out its remaining
5 royalty obligations. After that there was absolutely no
6 interest Novell had with respect to how IBM acted under those
7 agreements.

8 Last issue. There are 281 fact statements they make,
9 40,000 pages of exhibits, and we are not charged with
10 responding to every legal argument in our opposition that might
11 have been made from those. We entered with four legal
12 arguments in the initial brief. The fact that they have not
13 extracted three new arguments about RCU, about these tests and
14 others, are not properly considered on this motion for summary
15 judgment and they were not a part of their initial papers. And
16 because we submitted as a part of the record all of our expert
17 reports, it happens that there is a part of the expert reports
18 that contradict those, and now they are wanting the Court on
19 summary judgment to make rulings about the weight to be given
20 to those expert reports, and we think that is purely
21 inappropriate.

22 Your Honor, I heard virtually nothing about our cross
23 motion with respect to DYNIX, and there is no dispute that
24 DYNIX is, in fact, a derivative product of System V. If the
25 Court agrees with us and the plain language of 2.01, then that

1 limited but appropriate partial summary judgment should be
2 entered.

3 Thank you very much.

4 THE COURT: Thank you. Thanks to you both.

5 I'll take these contract motions under advisement. I
6 have a jury I have to deal with. Realistically I think we're
7 looking at about 4:30 to continue with our motion.

8 We'll be in recess on this matter.

9 (Recess)

10 THE COURT: Welcome back, everyone. Sorry about the
11 delay.

12 We'll now take up IBM's motion for summary judgment
13 on SCO's copyright claim.

14 Are you arguing this, Mr. Marriott?

15 MR. MARRIOTT: I am, Your Honor.

16 THE COURT: You asked for 30 minutes each on this,
17 right?

18 MR. MARRIOTT: That sounds familiar, Judge.

19 THE COURT: Go ahead.

20 MR. MARRIOTT: On the grounds that IBM breached its
21 contractual obligations, and this is IBM, Your Honor, not
22 Sequent, SCO purported to terminate IBM's license to continue
23 to use its AIX product, to distribute that product, and it
24 demanded that IBM shut down its AIX business, which over the
25 course of decades it has invested hundreds of millions of

1 dollars in. We declined to do that and SCO amended its
2 complaint and asserted copyright infringement. That is the
3 claim that is at issue with this motion.

4 There are five reasons why summary judgment should be
5 entered in favor of IBM on this motion. One, SCO can't
6 identify and prove unauthorized copying by IBM. Two, SCO can't
7 establish a predicate breach of contract. Three, SCO cannot
8 terminate and did not properly terminate IBM's license. Four,
9 SCO can't prove that it owns the allegedly infringed
10 copyrights. Five, SCO has misused those alleged copyrights.
11 With Your Honor's permission I want to focus on just the first
12 three of those. By the parties in agreement and by order of
13 the Court, the remaining two, four and five, will be addressed
14 at the hearing on May 7th.

15 With that, Your Honor, point one, SCO can't show
16 unauthorized copying by IBM. This is summarized at tab two of
17 the book which I would like to approach and provide Your Honor.

18 THE COURT: Sure.

19 MR. MARRIOTT: We have a copy for counsel.

20 As you know, Your Honor, IBM repeatedly asked over
21 the course of this litigation for SCO specifically to identify
22 the allegedly misused information, and the Court repeatedly
23 ordered SCO to do that as we show at tab 3 of the book. In a
24 December 2003 order, Magistrate Judge Wells ordered SCO to
25 identify and state with specificity, and this is at tab three,

1 the source codes that form the basis of their action against
2 IBM.

3 Magistrate Judge Wells further ordered that SCO
4 provide detailed answers to IBM's interrogatories as set out
5 and requested in the interrogatories. She said, for example,
6 that SCO was to identify and state -- SCO was to respond fully
7 and in detail as stated in IBM's first set. Interrogatory one
8 said identify with specificity all of the confidential or
9 priority information that plaintiff alleges or contends IBM
10 misappropriated or misused.

11 Interrogatory four, likewise, Judge, asked that SCO
12 describe in detail the date of any alleged misuse or
13 misappropriation, and the specific manner in which IBM is
14 alleged to have engaged in the misuse or misappropriation.

15 Magistrate Judge Wells reiterated that order in March of 2004,
16 and then Your Honor set interim and final deadlines for final
17 disclosures, and at this point SCO was required finally to
18 identify with specificity the allegedly misused information.

19 THE COURT: And you say they have not done that?

20 MR. MARRIOTT: They have not done that, Your Honor.

21 If you turn in the book to tab four, you will see
22 that in connection with our summary judgment papers, Your
23 Honor, we set out in paragraph 69 the following. Dispute the
24 Court's orders, SCO has never described by version final line
25 of coding any material allegedly infringed by IBM's

1 post-termination AIX and DYNIX activity. Moreover, SCO has
2 declined to provide full and detailed responses to IBM's
3 interrogatories directed at SCO's allegations of unauthorized
4 copying.

5 In response, Your Honor, SCO does not dispute that.
6 It says instead, simply, that, in effect, that it was not
7 required to do that. The Court has since made it abundantly
8 clear in a series of orders that, in fact, SCO was required to
9 do that, Your Honor, and it has still never done that. For
10 that reason, alone summary judgment on this claim should be
11 entered in IBM's favor. The orders of the Court were clear
12 that neither party could proceed with respect to any material
13 that wasn't identified as directed by the Court, and SCO has
14 not done that and the claim, Your Honor, should go for that
15 reason alone.

16 Point two, SCO can't establish a predicate breach of
17 contract, as we summarize at tab seven of our book. SCO's
18 copyright claim here, Your Honor, depends on whether it can
19 show that IBM breached one of its licensing agreements with
20 AT&T. It is on that basis that SCO purports to terminate IBM's
21 license. If there is no breach of contract, no predicate
22 breach, then the copyright claim fails as a matter of law. The
23 problems with SCO's contract claims have been discussed at
24 length in the papers and in the argument, and I don't intend to
25 repeat all of those here, but --

1 THE COURT: Good.

2 MR. MARRIOTT: Your Honor will recall that I said by
3 way of footnote in connection with the past argument that I
4 would dwell in this argument on the JFS language.

5 THE COURT: I do remember that.

8 Your Honor, SCO's contract claim involves, as I have
9 previously indicated, four contracts. Two of them are for IBM
10 and two for Sequent. The Sequent contracts are irrelevant to
11 this predicate breach of contract. The Sequent contracts were
12 about the distribution of DYNIX, not AIX. There is absolutely
13 no evidence that IBM has continued to distribute AIX. This is
14 all about the IBM agreements with AT&T and not the Sequent
15 agreements.

16 As I previously indicated, SCO has offered no
17 evidence and Mr. Singer did not point, Your Honor, to a shred
18 of evidence that IBM breached the sublicensing agreement.
19 SCO's entire case depends upon the IBM software agreement as it
20 relates to this purported cause of action for copyright
21 infringement. In its final disclosures, Your Honor, the only
22 contribution identified as having been made to Linux in
23 violation of SCO's rights is the JFS contribution. This claim
24 turns entirely on that.

25 So with that, Your Honor, let me suggest that there

1 are at least two reasons, and one of them has a lot of sub
2 reasons, why SCO's claims with respect to JFS fail as a matter
3 of law. The first of those reasons, Your Honor, is that SCO's
4 allegations of breach with respect to JFS simply lack merit,
5 and the second is that the alleged breach, even if it were a
6 breach, is immaterial as a matter of law and, therefore, can't
7 substantiate the kind of breach necessary to establish a breach
8 of contract.

9 Let's take the first of those, SCO's allegations with
10 respect to JFS lack merit. That is true, Your Honor, for at
11 least six reasons, and I am going to quickly run through those.

12 THE COURT: They are at tab ten, right?

13 MR. MARRIOTT: They are at tab ten, Your Honor.

14 Apparently the binder is not as difficult to follow as --

15 THE COURT: Not if I can figure it out. That is
16 right.

17 MR. MARRIOTT: The first reason, Your Honor, the JFS
18 contribution did not come from AIX, it came from IBM's OS2
19 operating system. SCO's theory depends on the proposition that
20 AIX is a derivative work of AT&T's UNIX System V software, for
21 which we don't believe there is adequate evidence in the
22 record, despite Mr. Singer's assertions to the contrary, but
23 assume that it is, Your Honor, the JFS contribution came from
24 IBM's OS2 operating system and it did not come from IBM's AIX
25 operating system.

1 a similarity that has any probative effect. That is point one,
2 Your Honor, as to why the JFS contribution allegations fail.

3 Point two. For this I refer Your Honor to tab 14 of
4 our book. SCO's claim fails unless the JFS contribution was
5 resulting material. Their entire theory depends upon, we
6 think, a distorted reading of Section 2.01 of the agreement.

7 But in any case, it depends upon the JFS contribution being
8 resulting material. As I said in the prior argument, it is
9 not. The undisputed evidence demonstrates that there is no
10 UNIX System V method, code or concept in that JFS contribution,
11 and that it was created independent of UNIX System V, and the
12 people who created it, Your Honor, the people who supposedly
13 made the contributions have offered testimony to that effect.

14 The only thing on which SCO relies in this connection
15 is the testimony of Mr. Ivie, which testimony again, Your
16 Honor, Magistrate Judge Wells could not properly be relied upon
17 because it was not properly disclosed in the final disclosures.

18 Point three. As I said in the last argument, Your
19 Honor, IBM owns the JFS contribution. There is not any dispute
20 about that. IBM owns it. IBM has copyrights in that
21 distribution, and SCO concedes that, as you see, at page 15 of
22 the book. It further concedes in its opposition papers that,
23 quote, under the Copyright Act, copyright ownership consists of
24 exclusive rights to, among other things, reproduce, prepare
25 derivative works, and distribute a work. IBM owns the

1 contributions and the notion that SCO can control it
2 effectively guts IBM's rights of ownership. If IBM's rights of
3 ownership mean anything, Your Honor, it means that IBM has the
4 right to do what a copyright holder under the copyright laws
5 has the right to do.

6 Mr. McBride, the CEO of the SCO group, Your Honor,
7 testified in his deposition in a way that is completely
8 contrary to the proposition that SCO can control anything and
9 everything that is in the AIX operating system. He said the
10 following, quote, I am sure there are things inside of AIX that
11 were not derived from System V or from one of our contractual
12 arrangements, that they would be free to do whatever they
13 wanted. That appears, Your Honor, in Mr. McBride's deposition
14 which is IBM Exhibit 330, page 231, lines 18 through 23.

15 Fourth point, Your Honor. Novell waived SCO's right
16 to terminate IBM's license pursuant to 4.16B of the asset
17 purchase agreement. We discussed this briefly in the last
18 argument. As we discussed there, the APA expressly gave Novell
19 the right to waive alleged breaches with respect to SVRX
20 licenses. The only issue, Your Honor, is whether the licenses
21 in question are SVRX licenses. There is absolutely no question
22 that they are. Mr. Singer made reference to a schedule in
23 which he says there is some lack of reference to the IBM
24 agreements being SVRX licenses. Let me walk you through that,
25 Your Honor, if I may.

1 If you don't have the book from the last argument, it
2 is at tab 40 of that book, and I have a copy to hand up.

3 THE COURT: I might have it.

4 MR. MARRIOTT: At tab 40 of that book, Your Honor, we
5 walked through why it is that the licenses in question here are
6 SVRX licenses. Let's take that given Mr. Singer's focus on
7 that issue. The first sentence of the asset purchase
8 agreement, 4.16A, states that SVRX licenses are those licenses
9 listed in detail under item six of Schedule 1.A hereof. Item
10 1.A of the asset purchase agreement provides a list of the SVRX
11 licenses that related to various UNIX System V software
12 releases, including System V releases 2.0 and so on. As well
13 as, quote, all prior UNIX system releases and versions
14 preceding UNIX System V release 2.0.

15 The supplements, Your Honor, to the IBM Sequent
16 agreements which are at issue in this motion identify the
17 licensed software product as consisting of various UNIX System
18 V releases. Again, as I said in the last hearing, Mr. McBride
19 in a letter to the C.E.O. of Novell conceded that the licenses
20 at issue here are SVRX licenses. In SCO's own opposition
21 papers in connection with this case acknowledge that the
22 licenses at issue are SVRX licenses. There is, we respectfully
23 submit, no genuine issue on that question, and as a result the
24 only real argument that SCO has made in opposition with respect
25 to 4.16B falls flat.

1 Fifth point, Your Honor, with respect to the JRS
2 contribution. SCO assigned its rights to the JFS contribution
3 to United Linux, as is illustrated at tab 19 of the book. We
4 discussed this briefly in connection with the prior motion
5 hearing, Your Honor. But the flaws in SCO's case are
6 particularly pronounced as they relate to the JFS contribution.

7 Again, as a member of the United Linux initiative,
8 SCO assigned all rights, all intellectual property rights that
9 it had with the exception of those specifically carved out to
10 the United Linux LLC. SCO's product -- SCO's Linux IV included
11 the JFS contribution. The JFS contribution was not on the list
12 of exclusions and, in fact, Your Honor, the JDC itself
13 specifically refers to JFS as a part of the joint development
14 product. And then SCO in its product announcement for its
15 United Linux product touted the product as including the JFS
16 contribution. Any claim to the JFS contribution, Your Honor,
17 is gone pursuant to SCO's assignment of rights under the United
18 Linux agreement.

19 Sixth point. SCO licensed the JFS contribution and
20 the GPL, the General Public License. This is the same basic
21 point as before. Again, the contribution was included in their
22 product, and the GPL is clear as to what it means, the license
23 in the GPL, and any claim as to that is gone.

24 Now, I said there were two points with respect to --
25 two general points with respect to JFS. The first is that

1 SCO's allegations related to JFS lack merit. That is the sixth
2 point I just listed. There is an additional point, Your Honor.
3 That is that even if there were merit to SCO's allegations of
4 breach relating to the JFS contributions, the alleged breach is
5 material. Assuming SCO has the right to terminate, as we'll
6 talk about in connection with my next point, it does not, but
7 assuming that it did have that right, the right to terminate
8 applies only with respect to breaches that are material
9 breaches of the agreement.

10 The IBM side letter, which Mr. Singer suggests in the
11 last argument IBM had ignored, expressly says that breaches can
12 be used as a basis for termination only if they are material
13 breaches. In the case law, Your Honor, which we lay out at tab
14 31 of the book, indicates that breaches that are sufficient to
15 permit termination must be material breaches. A material
16 breach is a breach that frustrates the core of the contract.
17 The cases describe it that it goes to the very purpose or the
18 root of the agreement.

19 The JFS contribution here, Your Honor, could not
20 possibly have gone to the root of an agreement between IBM and
21 AT&T in 1985 that concerned the protection of AT&T's UNIX
22 System V software. The JFS contribution, Your Honor, again,
23 which is owned by IBM and copyrighted by IBM, represents .01
24 percent of the Linux Kernel. There are as we show at tab 40 --
25 at tab 34 of this book, a large number of file systems, as much

1 as Mr. Singer suggests in the last argument that the JFS is the
2 next greatest thing to sliced bread, that there were 40 some
3 file systems in the Linux operating system, Your Honor. The
4 JFS contribution could not possibly be considered a material
5 breach of the contract, especially when IBM owns it and when
6 there is no UNIX System V code in it, and when the protections
7 of the software agreement as between IBM and AT&T, if they
8 meant anything, were about ultimately protecting AT&T's UNIX
9 System V source code. They have conceded there is no UNIX
10 System V -- there is no trade secret in UNIX System V. And yet
11 the contribution of IBM's own original work could go to the
12 root of an agreement that was about protecting not IBM's
13 original works, but the UNIX System V software? The arguments,
14 Your Honor, which SCO makes in this regard are dealt with in
15 our papers, and they are dealt with at tab 35 of the book if
16 Your Honor wishes to look at them there.

17 The third point and final point that I wish to make
18 this afternoon, is that SCO cannot establish a predicate --
19 rather cannot establish that it properly terminated IBM's
20 license. That is true for two reasons. The first reason, Your
21 Honor, is that IBM has pursuant to an amendment to its original
22 agreement with AT&T a perpetual and irrevocable license. That
23 is point one. Point two, Your Honor, is that even if under the
24 language of the original agreement the license could be
25 terminated, SCO failed to abide by the requirements for

1 termination. I will talk Your Honor through those.

2 Let me take now, if I may, each of those in turn.

3 First the irrevocable and perpetual license. Referring Your
4 Honor to tab 37 of the book, the plain language of amendment X
5 granted IBM a perpetual and irrevocable license. Amendment X
6 says, and I quote, IBM will have the irrevocable, fully paid up
7 perpetual right to exercise all of its rights under the
8 agreement. The meaning of the term irrevocable and perpetual
9 is no mystery. They are clear and they are unambiguous, and
10 some of the definitions of those terms, Your Honor, appear at
11 tab 38 and tab 39 of the book, from a variety of dictionaries.

12 For example, irrevocable is defined to mean
13 impossible to retract or revoke, that which cannot be
14 abrogated, annulled, or withdrawn, not revocable, irreversible,
15 final, unmodifiable, indistinguishable, unalterable, immovable.

16 THE COURT: I see one that says lasting for eternity.

17 Are you claiming that here?

18 MR. MARRIOTT: I like that idea, Your Honor, lasting
19 for eternity. A lasting irrevocable license that lasts for
20 eternity, in a sense, Your Honor.

21 Similarly, with respect to perpetual, which is
22 actually the definition for lasting for eternity, it is also
23 defined, Your Honor, as continuous, without interruption,
24 everlasting, eternal, lasting or destined to last forever.

25 Accordingly, Your Honor, on the plain language of the

1 agreement IBM has a perpetual and irrevocable license. It does
2 not have a terminable license as SCO suggests, as is required
3 for it to have terminated IBM's license, which is the predicate
4 to this claim of breach of contract.

5 Now, the second point here, Your Honor, is that even
6 if the license were revocable, even if it were not perpetual,
7 and even if SCO could do as it purports to have done here to
8 terminate it, there are under the terms of the agreement before
9 it was amended, to give IBM an irrevocable and perpetual
10 license, requirements that have to be satisfied. Prior to
11 being able to terminate IBM's license, SCO had to give IBM, and
12 we lay this out at tab 45, SCO had to give IBM notice, it had
13 to give IBM an opportunity to cure, and it had to exercise its
14 good faith best efforts to avoid termination.

15 As shown at tab 46, Your Honor, the case law in New
16 York which controls this agreement is clear that where there
17 are provisions of this kind, that the plaintiff must satisfy
18 the requirements to provide notice and cure and an opportunity
19 for cure and meet its duty of good faith best efforts to
20 resolve the agreement short of termination before it can in
21 fact terminate. SCO couldn't satisfy any of those three, Your
22 Honor, and for that reason, summary judgment should be entered
23 in IBM's favor as well.

24 Let me take those each briefly. Notice, SCO's notice
25 letter, Your Honor, which was filed with its complaint in this

1 action, which we have attached in the book at tab 48, accused
2 IBM of improperly disclosing, of misappropriating even SCO's
3 trade secrets. Well, again, Your Honor, as I have now said at
4 least twice, SCO has conceded that there are no trade secrets
5 in UNIX System V. It made that concession in open court after
6 it purported to terminate IBM's license. The notice letter
7 says you misappropriated our trade secrets, stop or we're going
8 to terminate your license.

9 It then admits after it has terminated IBM's license
10 that there are no trade secrets in UNIX System V. It withdraws
11 its claim for trade secret misappropriation.

12 Opportunity to cure. Because it never disclosed with
13 any meaningful particularity what it was it was complaining
14 about, Your Honor, IBM was never given an opportunity to cure
15 the alleged breach. In fact, Your Honor, if I may approach --

16 THE COURT: You may.

17 MR. MARRIOTT: Thank you.

18 Following SCO's letter of March 6th in which it
19 indicated that it was going to terminate IBM's license, IBM
20 sent SCO a letter and said, well, what is it that you contend
21 we did? Please tell us what it is you claim that we need to do
22 to cure this alleged breach. The response that we received,
23 Your Honor, from Mr. McBride, the C.E.O. of the company said,
24 quote, if you would like further written information regarding
25 IBM's past and continuing violations, we need more information

1 from you. So rather than provide IBM a meaningful opportunity
2 to cure, Your Honor, we were told that before we would learn
3 anything more about what we supposedly had done, we would need
4 to tell SCO what it is that we, in fact, had done.

5 Finally, Your Honor, with respect to good faith and
6 best efforts, again, as you know, and I reluctantly repeat what
7 has been said so many times before, IBM has repeatedly asked
8 SCO in this litigation what it is that we supposedly did. SCO
9 has repeatedly refused to provide IBM that information and,
10 instead, Your Honor, played what I think is a game of where is
11 the pea? It has required motion after motion to figure out
12 what exactly it was that IBM supposedly did.

13 It was only after IBM filed motions to compel that we
14 finally learned something of consequence about the JFS
15 contribution, about which so much still remains a mystery. It
16 simply cannot be, Your Honor, that SCO provided by way of its
17 notice letter, proper notice, a notice 100 days before the
18 supposed termination, that it gave IBM a reasonable opportunity
19 to cure, and that it exercised its good faith best efforts, not
20 just good faith efforts, it is good faith best efforts, and I
21 would respectfully submit that no reasonable juror could
22 conclude in this instance that SCO exercised its good faith
23 best efforts to provide IBM information sufficient to allow a
24 cure of the supposed breach.

25 In summary, Your Honor, summary judgment should be

1 entered in favor of IBM on this motion for five reasons. The
2 three I touched upon here are that SCO can't establish
3 unauthorized copying by IBM, they can't show a predicate breach
4 of contract, and IBM's license is in any event not a terminable
5 license, and certainly not one that satisfies the conditions to
6 terminate.

7 Thank you.

8 THE COURT: Thank you, Mr. Marriott.

9 Mr. Hatch.

10 MR. HATCH: Thank you, Your Honor. Good to be here.

11 Let me start with what I think is really one of the
12 more obvious ones, and it is IBM's claim that these contracts
13 are not terminable. I think we need to know more than look at
14 the plain language of the agreement. And, again, I didn't want
15 to disappoint, so I have a book as well.

16 THE COURT: I am sure that you do.

17 MR. HATCH: I just want to be clear that we
18 understand what contract we are talking about. In 1985 the
19 parties, AT&T, its predecessor to SCO, and IBM entered into two
20 main agreements. One is the software agreement which covers
21 how the source code itself would be handled. The same day a
22 sublicense agreement was entered into which allowed IBM to
23 relicense certain products it had, machine readable binary
24 code, and it did not have source code in it. The termination
25 rights that we're talking about here come from section six in

1 the source code agreement, Section 2.07 and 3.03 of the
2 sublicensing agreement.

3 Now, if you wouldn't mind turning to tab six, that
4 just shows from the software agreement, Section 6.03. As you
5 can see there, if the licensee fails to fulfill one or more of
6 its obligations under this agreement, AT&T may upon its
7 election, in addition to other remedies it may have, at any
8 time terminate all the rights granted by it hereunder, and it
9 gives a notice provision. Now, there are similar provisions in
10 the sublicensing agreement.

11 Now, on the same day, to make it even more complex,
12 because these were essentially form agreements, agreements that
13 had in large part been used with other parties. We often
14 forget, and Mr. Singer alluded to it, but there are similar
15 agreements have been done with many other companies. IBM is
16 the first one that has taken the approach that we're hearing
17 today. So IBM wanted some concessions. Instead of changing
18 the formal contract, they entered into a side letter that exact
19 same day.

20 The side letter modified both the software agreement
21 and the sublicensing agreement. What is important about that
22 is when it modified the agreement, it expressly called out and
23 identified the sections in the two contracts it was modifying,
24 so it would be very clear what it was modifying. If Your Honor
25 would turn to tab seven, this is one such section in the side

1 letter. You'll notice here that, lo and behold, this is
2 actually a modification of the termination rights in both of
3 these two main agreements, Section 6.03 of the software
4 agreement and Section 2.07 and 3.03 of the sublicensing
5 agreement. So the parties clearly knew and understood, and the
6 plain language was if we're going to modify it, we're going to
7 identify it so you know exactly what we're modifying. Here
8 you'll notice that it goes to the notice and cure provision
9 that Mr. Marriott talked about, so they thought it was
10 important enough to refer that expressly and that explicitly,
11 even when it was something as minor as changing the notice from
12 60 days to 100 days. It wasn't even a big part of the
13 contract, and yet they used that type of expressivity.

14 Now, if we go to amendment ten, which is where they
15 claim this was all modified, and if Your Honor does not mind, I
16 would like to use an actual copy of it if we can, instead of
17 the slides and the book.

18 THE COURT: Okay.

19 MR. HATCH: Now, this particular amendment ten came
20 to be several years later in 1996. The purpose of it was very
21 clear. As IBM had grown tired of trying to manage and account
22 for the royalties that were due under the underlying
23 agreements, they wanted to buy out the royalty stream and have
24 it paid all up front, paid at once. Okay. The first
25 underlining that you see that I have in the recitals makes it

1 very clear that that is what this amendment is about. It says
2 in an effort to simplify the royalty requirements contained in
3 the related agreements, the following modifications to the
4 terms and conditions of the related agreements have been
5 mutually agreed to by the parties. So that is putting in
6 context what is happening here.

7 Now, you'll notice, and it is very interesting here,
8 that the section in which they claim they get a non-terminable
9 right, and, one, it does not mention that word, two, it is
10 unlike the side letter where specific sections of the
11 agreement, the termination sections were agreed to, so the
12 parties know what is being modified, it just says no additional
13 royalty. That is what was at issue here.

14 Just to juxtapose that, if you look at paragraph two
15 on the next page, you'll see that when they wanted to modify
16 2.05B and 2.05C of the sublicensee agreement they called it out
17 so everyone would know what was being modified. Now, what was
18 being modified here wasn't a section but a schedule of
19 royalties, and they were paying them up in full. They were
20 given an irrevocable, fully paid up perpetual right to exercise
21 rights. So it is very clear, and that should really be the end
22 of it, is that in the plain language, this is not modifying any
23 termination rights in the contract, otherwise they would have
24 said so.

25 The plain language of that provision cannot be read

1 to suggest that it completely eliminated the termination
2 provisions, the material termination provisions of both the
3 software agreement and the sublicense agreement without a
4 mention of it. This is all being read into it by IBM today.

5 Now, that should be enough, but let's look at the
6 language itself. IBM has raised the issue that somehow
7 irrevocable and fully paid up and perpetual really mean
8 non-terminable. Well, if you will notice here, what it really
9 does say is it does not say here that they are given an
10 irrevocable license. They read that, and they say that in the
11 briefs, but that is not the wording here. The wording is they
12 have been given an irrevocable and fully paid up perpetual
13 right to exercise their rights, in other words, under the
14 related agreement. Okay. In other words, as is set out in the
15 recitals they don't have to pay anything else. No matter what
16 we do, we cannot require them to pay extra money. This is
17 being paid up now, and if we decide this is a bad deal ten
18 years from now, we can't require them to start paying royalty
19 payments again or another up-front payment or anything of that
20 nature. That is what perpetual and irrevocable means. They do
21 not mean non-terminable. They could have said that and they
22 didn't.

23 Now, we did one other thing, and if you look in that
24 same section, and it actually goes on to the second page, and
25 it goes on because the drafters of this agreement wanted to

1 make it very clear that they really weren't going beyond giving
2 them an irrevocable right and a perpetual right not to pay
3 royalty payments. They wanted to make it clear that it is not
4 affecting anything else. It says notwithstanding the above,
5 the irrevocable nature of the above rights will in no way be
6 construed to limit, and now we are talking about very broad
7 language, it is not going to limit SCO's rights to enjoin or
8 otherwise prohibit IBM from violating any of Novell's or SCO's
9 rights under this amendment ten or the related agreement. One
10 of their rights certainly is termination, but this is broad
11 language because it is saying this contract cannot be read to
12 give you additional rights other than the ones expressly set
13 forth. It never addressed termination.

14 Now, they say enjoin means all that you can do is
15 court action. You can seek an injunction for court action.
16 Well, that is not what that means. In a normal sense of the
17 words, parties when they contract with each other quite often
18 use as authority the contract language itself, and bring back,
19 especially a contract that lasts as long as one like this, to
20 the knowledge of people saying, by the way, you're doing
21 something that you ought not to be doing. The authority that
22 is cited is the contract itself.

23 Even if that were the case, it says or otherwise
24 prohibited. With the or being used as the alternative, and to
25 have any meaning at all, it is clearly a broad provision here

1 that SCO has the right, has kept all of its rights under the
2 contract and has the ability to do whatever it needs to enforce
3 those rights, including breach.

4 Now, IBM's reading would make all of that just
5 superfluous. The parties knew that, and if we look at one
6 point in time, of course, Novell sold its rights out and the
7 technology licensing agreement to Santa Cruz, a predecessor to
8 SCO as well. IBM objects to this because they were not a
9 party, but this was involving the same licensing agreement and
10 rights, and I have a copy at tab 11, and you'll notice there
11 that the same parties here, which were Novell and Santa Cruz,
12 that when they wanted to make something non-terminable they
13 knew how to do it. They used that language and they said that.
14 They said it was a non-exclusive, non-terminable worldwide fee
15 license.

16 So if we look at just the plain language, what IBM is
17 asking you to do is to read things into it. They are not
18 making a plain language argument. They are trying to change
19 the language.

20 Now, we went to Nimmer & Dodd. Nimmer, as you know,
21 has written a case book on copyrights, but he also with Mr.
22 Dodd did a treatise called Modern Licensing Law. He addressed
23 this exact point. At tab 10, the highlighted part, the license
24 contains terms that provide that it is irrevocable or
25 perpetual. We understand these terms to mean that the license

1 cannot be terminated by the licensor or otherwise and except
2 for breach by the licensee. In other words, SCO in this
3 instance can't take an act to then revoke the rights, revoke
4 the charge in the amendment that they do not have to pay any
5 more royalties, but if IBM breaches the agreement, then that is
6 totally within their control. IBM argued in the brief that
7 this just gives SCO willy-nilly to be able to cancel any time
8 they want and ruin their investment. That is absolutely not
9 true and they can't point to any language that allows us to do
10 that. It is totally in IBM's control. If you fail the terms
11 of the agreement, they go forward. If they breach it, we have
12 our remedies.

13 Now, that being a pretty strong statement from
14 Professor Nimmer, they filed an affidavit from Professor Nimmer
15 trying to say, well, it didn't quite mean that. Well, there
16 are a couple of problems with that. One, not the least of
17 which is that he is giving expert opinions without any chance
18 to cross-examine, and he has also determined that apparently
19 Mr. Nimmer has represented to us that he is a paid consultant
20 of IBM and that was not disclosed when he gave the declaration.
21 I don't think he's trying to get out of the wording that he put
22 in his treatise has any application whatsoever.

23 Importantly, in their brief, and some of these
24 arguments I just don't understand, but IBM in its brief said,
25 well, we shouldn't listen to what Mr. Nimmer said in his text,

1 in his treatise that he put out for peer review and put out
2 into the world because he is just summarizing cases. Well, our
3 view is that his book is there and it is called Modern
4 Licensing Law, and it is there to set forth industry practices,
5 and for the industry to rely on and to understand what terms
6 mean. If he is summarizing cases, then I guess IBM is saying,
7 well, that is the law pronounced by the court, so I didn't know
8 how that helps them in any way.

9 Now, even if somehow Your Honor still said this is
10 ambiguous, okay, I think if it becomes really unclear, then it
11 is not a matter for summary judgment. Unless the extrinsic
12 evidence is clear, which we think it is, the extrinsic evidence
13 that we have put forward is a number of people, none of whom
14 were employed by SCO, they are all people who were involved in
15 the initial transactions and negotiated it and set it forth,
16 and what was the meaning? The fact that they don't say
17 non-terminable, can we read that in as evidence as to what they
18 intended?

19 Well, I think what is most telling of that, if you
20 turn to tab 20, is Steven Sabbath. Mr. Sabbath was Santa
21 Cruz's vice president of law and corporate affairs. He was
22 Santa Cruz's signatory to amendment X. He was asked the
23 question, and he said as I said before the phrase irrevocable,
24 fully paid up and perpetual, you usually see that strung
25 together. Commercial lawyers don't define it. It's, you know,

1 like the sun and the moon. I mean you don't have to define it.

2 We know what it is.

3 Then Mr. Marriott, who I believe was the one taking
4 this deposition, said and that is because irrevocable means
5 what it means in the ordinary sense of the term. He said, yes,
6 it does not mean non-terminable in the event of, you know,
7 breach or default. It just means you're getting -- you pay on
8 time, and we can't change our mind on you and terminate unless
9 you pay more. We can't charge more. It is perpetual. It is
10 forever. It is a one-time fee. Okay. It does not mean
11 anything more than that.

12 Kimberly Madsen, a manager, at tab 21, and she was a
13 manager in the Santa Cruz law department and was there at the
14 time, said that I did not understand amendment ten to preclude
15 termination for breach.

16 Alok Mohan at tab 23, the president and chief
17 executive officer of Santa Cruz, and a high level participant
18 in the negotiations, said that that language did not preclude
19 termination for breach. No one else during the negotiations
20 contradicted that.

21 Doug Michels at tab 22, and he was a senior executive
22 and later the CEO, he makes it very clear that I would not have
23 agreed to the terms of amendment X if it had been explained to
24 me that way.

25 Now, IBM just raised with you a concept that I kind

1 of enjoyed. I have to really work to be able to remember it,
2 but it is unexpressed subjective intent. They claim that,
3 well, gee, if Santa Cruz meant something else they should have
4 told us. Well, the people who are trying to read a word in
5 here that is not there, it is not SCO, it is IBM. If anybody
6 had an unexpressed subjective intent it was them, because if
7 they meant that language to mean something different than what
8 it means by its plain language, and what Nimmer meant and what
9 he understood and what businesspeople understood, and they
10 never raised it in these meetings, as indicated by Mr. Michels
11 and others there, then that is unexpressed subjective intent.
12 They are putting new words in and trying to give words
13 different meanings.

14 Now, even Novell's people have the same thing. When
15 Mr. Singer went through Mr. Bouffard's testimony, and at tab 19
16 is what he said, and he was the other side of that from Novell,
17 he said it was not my view that Santa Cruz was precluded from
18 terminating UNIX source code. He said the otherwise language
19 includes terminating IBM UNIX license agreement for IBM's
20 actual breaches. We have plain language and we have authority
21 and we have law and we have extrinsic evidence, all of which
22 point directly to the fact that IBM is trying to read into this
23 contract things that don't exist there.

24 Now, I think we cover pretty well in our brief the
25 arguments Mr. Marriott raised on notice and opportunity to

1 cure. I am not sure how serious an argument that can really
2 be. I will just say this: What they forget is that there were
3 a number of meetings, a number of meetings prior to the letter
4 giving notice of potential termination if they did not cure.
5 What basically happened in those meetings, and what I want to
6 show you is kind of how, in a bit, how that started, but if you
7 turn to tab 69, in January of 2003 this is how IBM starts this.
8 In large part SCO starts to became aware of what IBM is up to.

9 At Linux World New York, which is, as I understand
10 it, the world's largest trade show for Linux, the largest
11 conference, Mr. Steven Mills, who was a senior executive at
12 IBM, indicated, and this is from the Computer Reseller News,
13 but in this deposition he confirmed that he said these things.
14 He said IBM will exploit -- that is an interesting choice of
15 words -- exploit its expertise in AIX to bring Linux up to par
16 with UNIX.

17 Then further down he says our deep experience with
18 AIX and its 250-member open source development team -- well, we
19 have found out in discovery that 250-member team are the people
20 who got the UNIX source code and were under the obligations of
21 confidentiality, and they got SCO's copyrighted works and now
22 they are changing. They are taking all that knowledge and they
23 are now considered their 250-man open source development team,
24 and he says the road to get there is well understood. Well,
25 they have a great jump-start. Then he ends it by saying that

1 what their goal is is to obliterate UNIX.

2 Well, they now say, well, gee, if you had just given
3 us a better notice and an opportunity to cure, maybe we could
4 have gone through these things, but through several meetings
5 prior to the filing of the complaint and giving the notice
6 letter, Mr. McBride and others had met with senior people at
7 Novell, and they were basically told, and a lot of this is out
8 of Mr. McBride's affidavit and other places in the record and
9 in our briefs, that if SCO goes forward, we're going to talk to
10 your partners and we're going to destroy your business. As a
11 matter of fact, Karen Smith, an IBM vice president, went to HP
12 and attempted to get them to withdraw support. That is going
13 to be the subject of another motion that I think we're hearing
14 Monday. That is the tone of it.

15 The thing that is kind of important to note is that
16 the notice and opportunity to cure we're supposed to give them
17 is not that we won't file suit because we gave them that. But
18 in every instance they said to us, in essence, it is futile,
19 we're fixed, it is unequivocal, we know what we're going to do.
20 It does not matter. We followed the letter of the law and we
21 gave them the letter and gave them 100 days' notice. They knew
22 what it was about.

23 Here is what they said. Instead of trying to
24 negotiate with us and to try and cure it -- as a matter of
25 fact, at one point they said we can't meet with you now. We

1 will meet with you in three months. At tab 77 this is what
2 their response was. This is an IBM press release from the 16th
3 of June of 2003. In the second paragraph it says from the
4 outset, it does not say we just came up with this, from the
5 outset IBM's position on this lawsuit has been unequivocal.
6 IBM's licenses are irrevocable and perpetual and fully paid up
7 and cannot be terminated. IBM will defend itself vigorously.
8 The matter will be resolved in the normal legal process. In
9 other words, they are now saying there is nothing to negotiate.
10 There is nothing to talk about. The dispute is fixed as of
11 that moment.

12 In the next paragraph, and this comes up a little
13 later, you'll remember that Mr. Marriott indicated that, well,
14 we didn't know it was about AIX. Here it is in June, their
15 notice, their press release to the world says IBM will continue
16 to ship, support and develop AIX. They knew that is what the
17 issue was from day one. Now they are saying we never disclosed
18 and they didn't know. That is just simply not true.

19 Let me move quickly to JFS. Mr. Marriott talked at
20 length about that. IBM claims that JFS came from OS2. They
21 gave you a graph. I would like you to look at the one that we
22 prepared as well from our expert report. It is at tab 49.
23 Using IBM documents that were produced in discovery, and this
24 is probably the best graphic --

25 THE COURT: Go ahead.

1 MR. SINGER: -- depiction that I can give you, the
2 file system that we're talking about began in UNIX System V.
3 It was owned by AT&T the predecessor of SCO. IBM licensed that
4 initially and put it in AIX version two back in the early
5 nineties. Eventually IBM modified and improved the AIX
6 system's version 3.1, and as derivative works, and Mr. Singer
7 has talked about it, used the file system to create a journal
8 file system.

1 so it appears as though JFS two, and if you look at the chart
2 that is what was in OS2. It is their derivative work that
3 originally starts from System V and comes through its
4 improvements and through to the end, and it says it appears
5 that JFS continued to have and continued to include files that
6 were based upon, at least in part, AT&T's UNIX source code,
7 right? Answer, it appears to be that way. Well, why does he
8 say that, Your Honor? Well, if we go to disclosure one, and we
9 look at the files, and if you look at tab 37, and here it is
10 just talking about JFS, there were identified to be 62 C files
11 in JFS. You'll see that the top 30 came from AT&T. How do we
12 know that? Well, the comments, I believe it is from CMVC that
13 the programmers wrote, they state the origin. The origin says
14 origin three. All 30 of these, almost half of our entire JFS
15 originated from AT&T.

16 Now, we just heard IBM say it came solely from OS2.
17 That is because they want to write out the prior history. They
18 want to draw a line in history and don't look in front of it.

19 Your Honor, I will give you this. This is an extra
20 copy. What I'm reading from is from tab nine of the first
21 disclosure.

22 From Mr. Baker's testimony that we just read, you'll
23 notice -- let's see. Mr. Baker is talking about some of this
24 stuff, and you'll remember that at tab 44 Mr. Baker identified
25 that his user ID was 905. The question was asked, if your

1 using ID was 905 for the CMVC, and that is where the
2 programmers recorded their notes, would you agree that this --
3 he is referring to the exhibit at tab 45 -- is a comment you
4 made into the CMVC at that time? Answer, yes.

5 Now, this is just one example of many from an IBM
6 programmer. You'll see Exhibit 887 and it is an e-mail from
7 Baker, and from CMC where he is making comments, and 905 is his
8 number, and what he is saying here is making a comment to the
9 people in his division. The same is true in the System V file
10 system where this stuff originates. He does not say OS2. The
11 only way it could be OS2 is if you drew a line and forgot all
12 the previous stuff and where it started.

13 As we go down that list, over half, according to the
14 testimony of just Mr. Baker who was an IBM employee, over half
15 of JFS as it ended up in Linux came from and originated from
16 the source code here that they were not allowed to give away by
17 contract.

18 Now, Your Honor, if you thumb through this book
19 you'll see, and there are numerous pages, and I have put a
20 bunch of them at tabs 38 through 42 or so, but you'll see here
21 there is a lot of red. They say we don't disclose anything.
22 These are all disclosures where it is either verbatim or near
23 verbatim. The AIX, that we just learned from IBM's own mouth
24 is derived from the System V code, is being taken almost
25 wholesale and put into Linux. They say there is nothing. That

1 is just simply not the case.

2 Now, I think the last point is Mr. Marriott
3 indicated, well, it is not material. This JFS stuff just does
4 not matter.

5 If I can approach?

6 THE COURT: Yes.

7 MR. HATCH: This is an internal IBM e-mail. If you
8 look on the fourth page, and now they are saying that JFS is
9 .01 percent, and I think during the contract argument I heard
10 him call it just the fuzzy dice on the dash of a car. Well,
11 let's see what they say when they are not talking to the Court.
12 Let's look and see what they are talking about when they are
13 trying to develop a product and make money.

14 On the third page of this, it says we, IBM, would
15 like to make JFS available to the open source community for
16 several reasons. I have highlighted the number one reason, a
17 lack of a journal file system on the Linux platform was chosen
18 as the number one deficiency by the Linux community. That does
19 not sound immaterial to me. It sounds a lot more than fuzzy
20 dice.

21 There are several instances where I disagree with Mr.
22 Marriott. I think he misquoted Mr. McBride. He quoted Mr.
23 McBride for the proposition that he said that they could do
24 whatever they wanted with their code, and I think, just like we
25 saw earlier today with the clips, not everything was read. Mr.

1 McBride's actual testimony was the exact opposite of that. He
2 said my view of that is that IBM is free to contribute anything
3 they owned to Linux, and that is about as far as IBM went
4 today, except they didn't read the rest of it, except as it
5 relates to either source code that we own or a derivative of
6 that code. So he is saying exactly what we are saying here,
7 and they're trying so cite and smear Mr. McBride as saying
8 something totally opposite to what is in the case.

9 Your Honor, I think based on that, there clearly is
10 no basis for IBM to get summary judgment granted here and I
11 submit it.

12 Thank you.

13 THE COURT: Thank you.

14 Mr. Marriott.

15 MR. MARRIOTT: Thank you, Your Honor.

16 Mr. Hatch said a number of things, Your Honor, which
17 I think simply are not factually correct. I would point the
18 Court to the papers for that other than take too much time
19 here.

20 THE COURT: He went overtime so if you want to you
21 can, too.

22 MR. MARRIOTT: I appreciate that, Your Honor.

23 Contrary to what Mr. Hatch suggests, there are not
24 294 items of allegedly misused information in this case. There
25 is only one of them, the first item in their final disclosures

1 that is in any way relevant to this motion. That is the JFS
2 contribution. The reference to the 294 is, at a minimum,
3 grossly overstated.

4 Mr. Hatch suggests that I misrepresented the
5 testimony of Mr. McBride. I gave Your Honor a cite and I urge
6 you to look at the cite for yourself. There is nothing
7 misrepresented about it. Mr. McBride said that he is sure that
8 there are things in AIX which IBM could properly contribute to
9 Linux.

10 If that is true, Your Honor, and I think Mr. McBride
11 is right, if that is true it is completely inconsistent with
12 their theory of the case, that once you touch something they
13 call it a modification and a derivative work and it is forever
14 controlled by them and IBM can't without their permission
15 disclose it.

16 Mr. Hatch suggested that IBM conceded -- apparently I
17 conceded at the last argument that AIX is a derivative work of
18 AT&T's UNIX System V. I didn't concede that, Your Honor. The
19 evidence in the record does not demonstrate that.

20 Let me come to the points, if I may, Your Honor, that
21 were raised in my opening arguments and those to which Mr.
22 Hatch responded and did not respond. I began, Your Honor, by
23 pointing out that SCO had failed entirely to comply with the
24 Court's order to identify with specificity what it is
25 specifically that represents the infringing material here,

1 because of IBM's continued distribution of AIX. You heard not
2 a word from Mr. Hatch on that. It is not there. Because of
3 the Court's orders the claim should be dismissed for that
4 reason alone.

5 With respect to the JFS contribution, Your Honor, I
6 offered two reasons -- six reasons why the JFS allegation lacks
7 merit and one reason as to immateriality. Mr. Hatch, so far as
8 I could tell, addressed one, Your Honor, of the six arguments
9 as to JFS. As to that argument he pointed the Court to the
10 testimony principally of SCO's expert Mr. Ivie, who has offered
11 testimony to be sure that JFS comes from the AIX operating
12 system. The testimony on which they rely was struck by
13 Magistrate Judge Wells.

14 In any event, Your Honor, it is simply incorrect. If
15 you look at the witnesses who would have personal knowledge to
16 speak to this, people who actually were involved with the
17 contribution, whose testimony is set out in our book, they say
18 in unequivocal terms that it was from the OS2 operating system,
19 not from the AIX operating system.

20 Immateriality, Your Honor. Mr. Hatch suggests that
21 the alleged breach here is somehow a material breach because
22 there is an internal IBM e-mail from some person saying it
23 looks like the Linux community thinks there is a need for a
24 journal file system. That does not say anything about whether
25 the specific contribution here was a material breach of the

1 agreement. The fact that someone might like a certain
2 technology in Linux is entirely a separate question from
3 whether the supposedly improper contribution here was a
4 material breach of the agreement.

5 Again, as we say in our opening papers, Your Honor,
6 there are 40 plus file systems in the Linux operating system.
7 The JFS contribution represented less than .01 percent. It
8 cannot be, Your Honor, that that represents a material breach
9 when it is owned by IBM and reveals nothing of SCO's code.

10 With respect, Your Honor, to amendment X and the
11 perpetual and irrevocable license, Mr. Hatch suggests that IBM
12 seeks to rewrite the provision of that agreement. He began his
13 presentation with respect to references to the history of the
14 negotiations. I would respectfully submit that that
15 description, Your Honor, was riddled with errors and
16 inaccuracies, and I would simply point the Court to the papers
17 and to the sworn testimony of the people who were actually
18 involved in the discussions as to what the purpose of that
19 licensing agreement was, and why it was IBM sought what it
20 sought, and why it was given. Mr. Hatch focused on the
21 language in the agreement that concerns a fully paid up
22 royalty. That suggests that amendment X was only about fully
23 paid up royalties. I would point the Court to the agreement,
24 which you can read for yourself, and see that it was about a
25 heck of a lot more than a fully paid up royalty.

1 It is not IBM, Your Honor, that seeks to read
2 anything into the agreement. On the contrary, it is SCO that
3 seeks to read out of the agreement the words perpetual and
4 irrevocable. The notion that IBM's license is terminable here
5 is absolutely at odds with the idea that it has a perpetual and
6 irrevocable license. You cannot have a license that is
7 perpetual and irrevocable and at the same time terminable.
8 That makes no sense, Your Honor. It would strain the simple
9 meaning of the words perpetual and irrevocable beyond
10 recognition.

11 Mr. Hatch points to an excerpt from a treatise from
12 Professor Nimmer and suggests that somehow that is indicative
13 of what the plain meaning of the agreement is. It is not, Your
14 Honor. It is not parol evidence here and, in any event, as
15 Mr. Nimmer says in his declaration, the citation is a citation
16 that is misplaced. Whatever it is, it is not capable of
17 altering the plain and simple language of this agreement.

18 Parol evidence, Your Honor. The Court need not and,
19 indeed, should not even reach parol evidence on this motion.
20 The language of this is clear. If you do, however, I would
21 respectfully submit that the only parol evidence that matters
22 is that which was communicated. That is what New York law
23 provides, Your Honor. While Mr. Hatch referred to testimony
24 and viewpoints of certain people from Santa Cruz, they didn't
25 negotiate this agreement with IBM. The agreement was

1 negotiated between Novell and IBM and between Novell and Santa
2 Cruz. The Sabbath testimony to which Mr. Hatch refers was
3 never communicated to IBM. The record does not reflect that it
4 was.

5 Finally, Your Honor, with respect to notice and cure
6 and good faith, I think the record is as set out in the papers
7 and speaks for itself. A complaint was filed accusing IBM of
8 the misappropriation of trade secrets. After the termination
9 of the agreement, SCO concedes there are no trade secrets in
10 UNIX System V. This Court in connection with one of IBM's
11 summary judgment motions, year after the filing of this case,
12 maybe not years, but almost two years after the filing of this
13 case, expressed astonishment at the idea that despite the
14 public assertions of SCO, there had been no production of
15 evidence to support its allegations. The idea that IBM knew
16 before the filing of the suit, which is what Mr. Hatch
17 suggested, precisely what it is we supposedly did here, and how
18 it is we were to cure it, simply is not supported by the
19 record.

20 Summary judgment should be entered in favor of IBM,
21 Your Honor.

22 Thank you.

23 THE COURT: Mr. Hatch, briefly.

24 MR. HATCH: I will keep it brief this time.

25 Your Honor, it is kind of interesting, and I'll make

1 just a couple quick points. He is now saying that we should
2 read out all of the Santa Cruz people. What relevance do they
3 have? Well, if you look at the agreement, it is because they
4 are a party and a signatory. Mr. Sabbath is a signatory for
5 Santa Cruz right here. IBM is so desperate here that they want
6 to say you shouldn't even listen to anything that he has to say
7 because he is not relevant. Well, he was sure relevant to the
8 agreement at the time they signed it.

9 Mr. Marriott has also thrown up, and I think he did
10 in the contract case as well, a real red herring here. They
11 say what SCO is trying to do is control. You can't control
12 what we did. Well, what controls them is not SCO, it is their
13 contractual obligations. They made a deal that said if you'll
14 give us source code, we'll keep it confidential. If we develop
15 something with that source code, we will keep the drive source
16 code confidential as well. That was their choice. The
17 contract did that, not SCO.

18 Now, if they have got a big picture, and Mr. Marriott
19 is really correct that it is just the fuzzy dice on the
20 dashboard, then take them, the fuzzy dice off the dashboard.
21 They won't do that. They say, well, it is not material. This
22 JFS stuff is not important, but they won't take it out. They
23 knew, as the internal memo we gave you specifically said that,
24 that it was the -- I can't read this note.

25 THE COURT: You're going to have a hard time

1 commenting on it until you can read it.

2 MR. HATCH: The book that I gave you and this item
3 one, the thick disclosure --

4 THE COURT: Right.

5 MR. HATCH: Mr. Marriott kind of alluded to that, and
6 I don't know what he was talking about, but he alluded to Judge
7 Wells striking Ivie and striking things. Striking stuff from
8 IBM. That has never been struck. I don't know what he is
9 talking about there.

10 They want to get away from all of that verbatim
11 copying that we have shown from AIX and Linux, but that hasn't
12 been struck and it is there and that is in the case. There are
13 294 disclosures that are like that that are in the case. Some
14 are relevant to other points, I agree with that, but if there
15 is one, just one that I showed you, that in and of itself
16 creates enough of a fact issue for us to go forward. Dr. Ivie
17 talked about it and it is there and it has not been stricken.
18 IBM did not even move to have it stricken. I leave you with
19 that.

20 One quick point. He brought United Linux and I
21 forgot to address that. That is real interesting and that is
22 really kind of almost a little too cute for this case. What he
23 fails to tell you with United Linux, is he is saying there is a
24 waiver argument there, but what he fails to tell you is that
25 SCO entered into agreements with other people to build

1 something on the existing Linux Kernel. In other words, they
2 were going to put things in and then give it to the open source
3 community. Then he said when you put it in, it was all waived.
4 Well, he says this and his brief is very, very ambiguous on
5 this, and so I think it is important for Your Honor to
6 understand this, because they say it in a way that makes it
7 sound like the stuff that SCO put in on top of that Kernel to
8 build a new product is what we waived.

9 What was waived, of course, was the whole thing, but
10 what they don't tell you is unbeknownst, and to be fair there
11 are comments either way, but the JFS system was put into the
12 Kernel and SCO was unaware of that. That was put in there by
13 IBM. That is essentially saying IBM can take something in
14 violation of the contract and plug it into a document, and if
15 SCO does not find it out and it uses that and puts it in, that
16 somehow it was waived something. Waiver requires knowledge and
17 that is not here. At the very least it is hotly disputed. I
18 think they were somewhat disingenuous on that as well.

19 Thank you, Your Honor.

20 THE COURT: Thank you.

21 Well, not surprisingly I will take these motions
22 under advisement and look forward to seeing all or most of you
23 again on Monday at 2:30.

24 Thank you.

25 We'll be in recess.

1 MR. SINGER: Thank you, Your Honor.

2 MR. MARRIOTT: Thank you, Your Honor.

3 (Proceedings concluded.)

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